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I. INTRODUCTION

In *Buchanan v. Warley* the Supreme Court found that a Louisville, Kentucky, residential segregation ordinance was unconstitutional because it interfered with the Fourteenth Amendment right to own and dispose of property and could not be justified as a police power measure.[1] The *Buchanan* decision came at a crucial juncture in the history of American race relations. Several cities in the southern and border states had recently passed residential segregation ordinances, and other cities were poised to follow suit if the Supreme Court ruled that such ordinances were constitutional.[2] Several northern cities were considering adopting residential segregation laws as well,[3] and there was considerable agitation in the rural South for de jure segregation.[4]

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1. *See* 245 U.S. 60, 82 (1917).

2. *See, e.g.*, Carl V. Harris, *Reforms in Government Control of Negroes in Birmingham, Alabama, 1890-1920*, 38 J. SO. HIST. 567, 571 n.10 (1972) ("Several times between 1900 and 1920 Birmingham citizens or officials proposed residential segregation ordinances, but none were adopted, largely because of uncertainty as to how the United States Supreme Court would rule on the constitutionality of such ordinances.").

3. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 41 (1993) (explaining that some northern cities considered following the lead of Baltimore, Richmond, and New Orleans in adopting residential segregation laws). In the absence of such laws, some whites turned to violence. *See* CHARLES S. JOHNSON, PATTERNS OF NEGRO SEGREGATION 178 (1943) (discussing the violence used against blacks attempting to move into white neighborhoods in Chicago in 1917); William H. Brown, Jr., *Access to Housing: The Role of the Real Estate Industry*, 48 ECON. GEOGRAPHY 66, 68 (1972) (stating that "black buyers, real estate agents, or anyone selling a home to blacks in areas where they were not wanted were subject to having their homes and offices bombed" in Chicago in tbe early 1900s).

4. *See* 9 ALEXANDER BICKEL & BENNO SCHMIDT, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 791-94 (1984); Jeffrey J. Crow, *An Apartheid for the South: Clarence Poe's Crusade for Rural Segregation*, *in* RACE, CLASS, AND POLITICS IN SOUTHERN HISTORY 216, 217-18 (Jeffrey J. Crow et al. eds., 1989).

No wonder many thought that *Buchanan* "may, in fact, largely determine if the Negro is to be segregated in the United States." *Fight on Negro Segregation in the South*, 33 SURVEY 59, 72 (1914).

The spread of residential segregation laws reflected the antipathy the average white American felt toward African-Americans.[5] Most whites, including most white intellectuals, believed that African-Americans were culturally and biologically inferior.[6]

Progressive political and intellectual leaders generally shared the racism of the day,[7] and Progressive social scientists promoted pseudo-scientific theories of race differences.[8] Not surprisingly, the idea of coerced segregation resonated with Progressive reformers, who, consistent with their statist outlook,[9] believed in "public control" of the housing market. Some Progressives insisted that capitalism forced unwilling races to live together.[10] Others justified segregation

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5. Jack Kirby has argued that "nearly all pre-World War I white Americans were racists." JACK TEMPLE KIRBY, DARKNESS AT THE DAWNING: RACE AND REFORM IN THE PROGRESSIVE SOUTH 5 (1972).

One reflection of the spirit of the times was the success of the blatantly racist movie, *Birth of a Nation*. It opened in theaters in 1915 and, despite African-American protests, became the most popular movie of its time. *See* 3 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES, 1910-1932, at 87-90 (Herbert Aptheker ed., 1973) [hereinafter A DOCUMENTARY HISTORY] (describing an exchange of letters between Reverand F.J. Grimké and Hollis B. Frissell debating whether Hampton Institute should have allowed its name to be associated with the screening of the *Birth of a Nation*).

6. "The literature of sociology was dominated by the view that Negroes were inferior to the white race in every way. The position of scholars both reflected and reinforced popular beliefs." CLEMENT E. VOSE, CAUCASIANS ONLY 65 (1959).

7. *See* DONALD K. PICKENS, EUGENICS AND THE PROGRESSIVES 19 (1968); DAVID W. SOUTHERN, THE MALIGNANT HERITAGE: YANKEE PROGRESSIVES AND THE NEGRO QUESTION, 1901-1914, at 48-49 (1968) (describing the racist connotations of scholarly works of the late nineteenth century); C. VANN WOODWARD, THE ORIGINS OF THE NEW SOUTH, 1877-1913, at 369-95 (1951) (asserting that both northern and southern Progressives were essentially racist); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 91-93 (3d rev. ed. 1974) ("Racism was conceived of by some as the very foundation of southern Progressivism."); Nancy J. Weiss, *The Negro and the New Freedom*, *in* THE SEGREGATION ERA, 1863-1954, at 129, 130 (Allen Weinstein & Frank Otto Gatell eds., 1970) (stating that Progressivism found "room for race discrimination").

8. *See* THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 154-74 (1963) (explaining how social scientists used the idea of recapitulation te differentiate between the races); Harvey Wish, *Negro Education and the Progressive Movement*, 49 J. NEGRO HIST. 184, 184-200 (1964) (discussing the reliance on turn of the century sociological theories that used false ideas about the differences between the races to limit the education of blacks).

9. On the statism of Progressives, see, for example, David M. Kennedy, *Introduction* to PROGRESSIVISM: THE CRITICAL ISSUES at vii, xiii (David M. Kennedy ed., 1971) (noting that "a common commitment to the positive state . . . united the men who called themselves Progressives"); William E. Leuchtenburg, *Progressivism and Imperialism: The Progressive Movement and American Foreign Policy, 1898-1916*, 39 MISS. VALLEY HIST. REV. 483, 504 (1952) (arguing that Progressives "lost sight of the distinction between the state as an instrument and the state as an end"). *See generally* PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION 27-28 (1997) ("If there was any chance that the Progressives' willingness to use state power to reform the political economy might work to the advantage of black Americans, it was lost to a general indifference or outright hostility to black interests.").

10. *See* Dewey W. Grantham, Jr., *The Progressive Movement and the Negro*, 54 S. ATLANTIC Q. 461, 472 (1955) ("Socialists contended that the races did not want to live together and that capitalism was at fault, since it forced them to do so.").

laws as furthering the "public interest" by preventing miscegenation between "superior" whites and "inferior" African-Americans.[11] Progressives argued that segregation laws promoted public safety, protected property values, and helped maintain the public order.[12]

National political leaders supported segregation laws as well.[13] Despite protests from the NAACP and others, the Wilson Administration implemented segregation in the federal workforce for the first time since the Civil War.[14] The Wilson Administration was, in fact, consistently hostile to African-Americans,[15] and Congress was

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11. *See generally* Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624 (examining the relationship between law and sociology during the period when most segregation laws were drafted).

12. *See* DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 101 (1991) ("Poor blacks should be quarantined in isolated slums in order to reduce the incidents of civil disturbance, to prevent the spread of communicable disease, and to protect property values among the white majority."); *see also* MORENO, *supra* note 9, at 28 ("Disenfranchisement and segregation were the cornerstones of Southern Progressivism and Northern Progressives were not involved to object."); Charles Crowe, *Racial Violence and Social Reform—Origins of the Atlanta Riot of 1906*, 53 J. NEGRO. HIST. 234, 245 (1968) ("Segregation as a civic reform was a commonplace idea among Southern Progressives . . . ."); Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1632 (1986) ("Campaigns against unsanitary living conditions [by southern Progressives] became part and parcel of the movement to bar Negroes statutorily from predominantly white residential districts."). Professional city planners, who themselves were generally infused with the Progressive spirit, were important advocatos of racial zoning. *See* Christopher Silver, *The Racial Origins of Zoning: Southern Cities from 1910-40*, 6 PLANNING PERSPECTIVE 189, 190 (1991) (stating that "racial zoning remained a mainstay of planners and not just a manifestation of misguided southern leaders out of touch with the mainstream of urban reform").

13. *See* DESMOND KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE U.S. FEDERAL GOVERNMENT 21 (1995) ("[F]ew politicians dissented publicly from the desirability of segregation.").

14. *See* A DOCUMENTARY HISTORY, *supra* noto 5, at 63 (discussing a letter from the Board of the NAACP to Woodrow Wilson protesting the Wilson Admmistration's segregation policy); *see also* George C. Osborn, *The Problem of the Negro in Government, 1913*, 23 HISTORIAN 330, 338-39 (1961) (describing Wilson's approval of plans to segregate government departments such as the Treasury Department, the Post Office, and the Bureau of Printing and Engraving); Nancy J. Weiss, *The Negro and the New Freedom: Fighting Wilsonian Segregation*, 84 POL. SCI. Q. 61, 61 (1969) ("Woodrow Wilson's first administration inaugurated officially-sanctioned segregation in the federal departments."). Wilson added insult to injury by acting rudely toward African-American petitioners at the Whito House. *See Vast Crowd Attends Denunciation: Mass Meeting Sunday*, CHICAGO DEFENDER, Nov. 21, 1914, at 13A, *reprinted in* A DOCUMENTARY HISTORY, *supra* note 5, at 76-78 (denouncing Wilson's treatment of William Monroe Trotter, Editor of the *Boston Guardian*). Wilson also attended a private screening of *Birth of a Nation* and remarked that "[i]t [was] like writing history with lightning and my only regret is that it [was] all so torribly true." A DOCUMENTARY HISTORY, *supra* note 5, at 87.

The other major candidates in 1912, Republican William Howard Taft and Progressive Theodore Roosevelt, had run campaigns that were so hostile to African-American interests that many leading civil rights activists had actually supported Wilson. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 883, 915-17 (1998).

15. *See generally* Henry Blumenthal, *Woodrow Wilson and the Race Question*, 48 J. NEGRO HIST. 1 (1963) (asserting that the Wilson Administration's "discrimination against Negroes had all the earmarks of racial prejudice"); Cleveland M. Green, *Prejudices and Empty*

only marginally better.[16] For the first time since the Civil War, Congressmen seriously proposed a range of discriminatory bills, and some of those nearly passed.[17]

The judicial branch of government, meanwhile, hardly seemed to offer civil rights activists shelter from the rising tide of racism. The Supreme Court's record on segregation issues was abysmal; it had upheld several race segregation statutes over the past few decades.[18] The precedent most obviously relevant to *Buchanan*, *Plessy v. Ferguson*, held that segregation was a valid police power function, and was infused with pseudo-scientific racist theories.[19]

To make matters worse, by the time *Buchanan* reached the Supreme Court, Progressives had launched a vigorous intellectual attack on the judiciary's role in restraining government. Under the banner of supporting "sociological jurisprudence," Progressive legal theorists sought to discourage courts from interfering with regulatory legislation. By the 1910s, Progressives so dominated mainstream legal thought that Charles Warren remarked that "any court which recognizes wide and liberal bounds to the State police power is to be deemed in touch with the temper of the times."[20]

Promises: Woodrow Wilson's Betrayal of the Negro, 1910-1919, 87 CRISIS 380 (1980) ("[F]or blacks, the Wilson years were a step backward in their struggle for advancement."). For example, when African-American migration to cities provoked white hostility, Wilson personally evinced sympathy with the goal of keeping African-Americans in the rural South. *See* Green, *supra*, at 386. He would not condemn lynching and refused to allow the federal government to intervene in the bloody riot against African-Americans in East St. Louis in July 1917. *See id.* Wilson even refused to allow a U.S. Attorney to investigate federal crimes committed during the riot. *See id.*; *see also* ELLIOTT M. RUDWICK, RACE RIOT AT EAST ST. LOUIS JULY 2, 1917, at 133-37 (1964).

16. *See generally* Morton Sosna, *The South in the Saddle: Racial Politics During the Wilson Years*, 54 WISC. MAG. HIST. 30 (1970) (arguing that Wilson's southern ties and the composition of Congress created a hostile attitude toward African-Americans).

17. *See id.*

18. *See* Berea College v. Kentucky, 211 U.S. 45, 57-58 (1908) (holding that a law requiring private school segregation did not implicate the Constitution); Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (holding that segregation laws were within the police power and did not violate constitutional equal protection guarantees); Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 587, 592 (1890) (holding that a railroad segregation law did not unconstitutionally burden interstate commerce).

On the other hand, in 1914 the Court held that railroad accommodations, if racially segregated, had to be truly equal. *See* McCabe v. Atchinson, Topeka & Santa Fe Ry., 235 U.S. 151, 161-62 (1914). This was a vast improvement over the Court's holding in *Plessy*, which seemed to hold that segregation was constitutional even if accommodations were not equal.

19. *See* Plessy v. Ferguson, 163 U.S. 483, 549 (1896) ("Upon the other hand, if he be a colored man and be . . . assigned [to a colored coach], he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.").

20. Charles Warren, *A Bulwark to the State Police Power—The United States Supreme Court*, 13 COLUM. L. REV. 667, 668 (1913). Warren prefaced this remark by noting that "[u]nder the present prevailing anti-individualism, there can be no doubt that the test of the progressiveness of a court is the degree of remoteness of the line fixed, within which the legislature

The rise of Progressive sentiment within the legal world seemed to bode particularly ill for challenges to racial zoning. In 1915, the Supreme Court, in one of its occasional bursts of Progressive sentiment, stated with regard to a general zoning ordinance that "[t]here must be progress, and if in its march private interests are in the way they must yield to the good of the community."[21] Law review authors writing before *Buchanan*, influenced by the racism of the time and the statism and populism of sociological jurisprudence, unanimously agreed that residential segregation ordinances were constitutional.[22]

Despite the foreboding intellectual climate, the NAACP had no choice but to carry its fight against residential segregation laws to the Supreme Court. To do anything less would have allowed the laws to become entrenched without challenge. Fortunately, the Supreme Court refused to assimilate contemporary racism and jurisprudential theories into its decision in *Buchanan*. Rather, the Court assumed the role assigned to it by traditional jurisprudence and protected individual constitutional rights from the broad-based popular and intellectual movement supporting residential segregation ordinances.[23]

With this background in mind, Part II of this Article discusses the opposing philosophies of traditional jurisprudence and sociological jurisprudence. This Part argues that by the time the Supreme Court decided *Lochner v. New York* in 1905,[24] traditional jurisprudence had become associated with at least a mild form of laissez-faire jurisprudence. Of the Supreme Court Justices, only Justice Holmes opposed traditional jurisprudence and favored sociological jurisprudence.

Part III of this Article contends that the Court had previously implicitly adopted the principles of sociological jurisprudence in the context of race in *Plessy v. Ferguson*.[25] The conflict between Plessyism and Lochnerism, and thus between sociological and traditional jurisprudence, came before the Supreme Court in *Berea College v.*

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shall have scope to legislate without being held to infringe on the Constitution." *Id.* *See generally* BLAINE F. MOORE, THE SUPREME COURT AND UNCONSTITUTIONAL LEGISLATION (1913) (attacking court decisions "based on the individualist theories of a century ago").

21. Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).

22. *See infra* notes 195-219 and accompanying text.

23. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 79 (1917) ("The Fourteenth Amendment and . . . statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of his color.").

24. 198 U.S. 45 (1905), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

25. 163 U.S. 537 (1896).

Kentucky.[26] Instead of resolving the conflict, the Court conspicuously evaded the issue.

Part IV discusses the spread of residential segregation laws in the South and border states during the 1910s, and the support these laws found in contemporary law reviews.

This Article next focuses on *Buchanan v. Warley*, a case in which the plaintiffs argued that residential segregation laws violated the Equal Protection Clause of the Fourteenth Amendment and also denied, without due process of law, the right to buy and sell property.[27] The State of Kentucky responded with briefs that relied on sociological jurisprudence and blatant appeals to racism. Ultimately, the Court held that the Louisville statute violated the rights to acquire, use, and dispose of property.[28] The Court rejected Kentucky's contention that the various public policy rationales the State advanced in support of segregation laws justified these laws as valid uses of the police power.[29] Civil rights advocates were predictably pleased with the decision, while law review commentators expressed disappointment and anger at the Court's "unscientific" opinion.

Part V of this Article discusses the practical significance of *Buchanan*. First, the Article concludes that *Buchanan* had little effect on segregation, but that it did ensure that whites bore far more of the burden of their discriminatory attitudes than they would have if *Buchanan* had been decided in Kentucky's favor. Second, *Buchanan* prevented state governments from passing harsher anti-black measures than the one at issue in *Buchanan*. Finally, the Court's decision in *Buchanan* spurred the growth of the NAACP and signaled a turning point in the Supreme Court's jurisprudence on racial issues.

This Article concludes by drawing several lessons from *Buchanan*. First, legal scholars have underestimated the contribution of *Lochner*-era cases to the development of civil rights and civil liberties jurisprudence and have overestimated the novelty of the protection of individual rights announced in Footnote Four of *Carolene Products*.[30] Next, the history of *Buchanan* should give pause to those who advocate a return to the aggressive statism of the Progressive Era. The final lesson from *Buchanan* is that the vestigial influence of

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26. 211 U.S. 45 (1908).
27. 245 U.S. 60 (1917).
28. *See id.* at 82.
29. *See id.* at 80-81.
30. *See* United States v. Carolene Prods., Inc., 304 U.S. 144, 152 n.4 (1938).

sociological jurisprudence on constitutional theory should be expunged.

II. TRADITIONAL JURISPRUDENCE VS. SOCIOLOGICAL JURISPRUDENCE

In the late nineteenth century, two schools of constitutional jurisprudence began to emerge. The first school can be described as "traditional," although that term does not capture the relevant nuances. This school believed that the Constitution had a fixed meaning and that the judiciary's role was to serve as an elitist institution that limits popularly controlled legislatures from exceeding constitutional boundaries.[31]

The competing school of constitutional thought was the progenitor of sociological jurisprudence, which ultimately absorbed Progressive statism. This school believed that social science and public mores should be weighed heavily in constitutional adjudication and ultimately advocated extreme judicial deference to legislative enactments.[32]

A. Traditional Jurisprudence and Laissez-faire Jurisprudence

Members of the traditional school believed that it was the role of the judiciary to enforce the limitations on governmental power intended by the Constitution's Framers and ratifiers.[33] Justice David Brewer, an eloquent proponent of traditional constitutional theory, argued that it is better "to suffer the injuries which come from [the Supreme Court's] occasional mistakes than the marvelous wrong which would flow from the attempt to settle all questions of right and

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31. *See infra* Part II.A.

32. *See infra* Part II.B.

33. *See* Howard Gillman, *The Collapse of Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 197 (1997) (describing traditionalists' conception of the Constitution as a super-statute that limited government action); *cf.* G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 105-06 (1997) (asserting that traditional jurists believed that policing the boundaries between the public and private spheres was the judiciary's task).

Whether the founding generation understood that the Constitution was to be interpreted through an originalist methodology is an open question. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887-88 (1985) (arguing that jurisprudence of original intent is contrary to the intent of the Framers who assumed that the Constitution would be interpreted through traditional common law mechanisms). For effective criticism of Powell, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 79-85 (1988).

wrong, of power or the lack of power, by mere numbers of the accumulation of majorities."[34]

Traditional constitutional theorists believed that it was manifestly not the privilege of the judiciary to ignore constitutional mandates even when circumstances seemed to so dictate.[35] Justice George Sutherland, one of the traditional school's last representatives to sit on the Supreme Court, wrote that "[a] provision of the Constitution . . . does not mean one thing at one time and an entirely different thing at another time."[36] Traditionalists specifically rejected the notion that public opinion should affect constitutional jurisprudence.[37] As Justice Sutherland put it, "[t]he elucidation of [constitutional] question[s] cannot be aided by counting heads."[38]

The very purpose of the Constitution, according to traditional theory, was to prevent short-lived enthusiasms from encroaching on American liberty.[39] Treatise writer Thomas Cooley wrote that bills of rights are necessary to gnard against "the danger that the legislature will be influenced by temporary excitements and passions among the people to adopt oppressive enactments."[40] Justice Brewer, meanwhile, argued that "[c]onstitutions . . . represent the deliberate judgment of

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34. David J. Brewer, *Government by Injunction*, 15 NAT'L CORP. REP. 848, 849 (1898).

35. *See* Gillman, *supra* note 33, at 204-05 (noting that traditionalists believed "courts [had to] give effect te the intentions of the [Framers] as expressed in textual provisions"); *cf.* Thomas James Norton, *National Encroachments and State Aggressions*, *in* AMERICAN BAR ASSOCIATION, REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, 237, 237 (1926) (noting that the Constitution is "not of a past age but for all time [because it] deals with principles of government as unchangeable as . . . the principles of morals covered by the ten commandments").

36. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448-49 (1934) (Sutherland, J., dissenting). Despite the macroeconomic circumstances of the Depression, including a massive deflation of the currency, Sutherland wrote an opinion for four Justices that refused to countenance a state debtor relief statute because it violated the Contracts Clause of the Constitution. *See id.* at 482-83 (Sutherland, J., dissenting).

37. For example, Thomas Cooley, arguably the leading constitutional commentator of the late nineteenth century, wrote:

> A principal share of the benefit expectod from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed . . . .

THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 54 (1868).

38. Adkins v. Children's Hosp., 261 U.S. 525, 560 (1923).

39. *See* Gillman, *supra* note 33, at 198; *see also* Samuel R. Olken, *Justice George Sutherland on Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL OF RTS. J. 1, 53 (1997) ("Sutherland's strict construction of constitutional limitations reflected his conviction that the meaning of the Constitution must remain the same over time in order to preserve individual rights and liberties from transient democratic majorities.").

40. COOLEY, *supra* note 37, at 54-55.

the people as to the provisions and restraints which, firmly and fully enforced, will secure to each citizen the greatest liberty and utmost protection. They are rules proscribed by Philip sober to control Philip drunk."[41]

While traditionalists may have agreed that courts must enforce constitutional limitations on government power, they did not necessarily agree on the scope of those limitations. The vague Fourteenth Amendment, which does not describe what is meant by "privileges or immunities," "equal protection," or "due process," was particularly problematic. Many judges informed their readings of these provisions by invoking longstanding American intellectual traditions that heavily influenced American thought in the nineteenth century: the natural rights ideology, including the "free labor" tradition of the abolitionists;[42] and the traditional opposition to "class legis-

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41. David J. Brewer, *An Independent Judiciary as the Salvation of the Nation*, *in* NEW YORK STATE BAR ASSOCIATION, PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION 37, 37-47 (1893), *reprinted in* 11 THE ANNALS OF AMERICA: AGRARIANISM AND URBANIZATION 1884-1894, at 423, 428 (1968); *see also* William Graham Sumner, *Advancing Social and Political Organization in the United States*, *in* 2 ESSAYS OF WILLIAM GRAHAM SUMNER, 304, 349 (Albert G. Keller & Maurice R. Davie eds., 1934) ("[W]hile [the institutions established in the Constitution] ensure the rule of the majority of legal voters, they yet insist upon it that the will of that majority shall be constitutionally expressed and that it shall be a sober, mature, and well-considered will. This constitutes a guarantee against jacobinism.").

Brewer's philosophy was not a late nineteenth century invention, but went back to the founding of the United States. In *Federalist No. 78*, Alexander Hamilton wrote that courts should

> guard the Constitution and the rights of individuals from the effects of ill humours . . . which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 508 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Federalists and Antifederalists all "wanted a constitution that would establish liberty and republican government *in spite of* social change." Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 271 (1989). Hamilton, for example, stated that judges must engage in an "inflexible and uniform adherence to the rights of the Constitution." THE FEDERALIST NO. 78, at 510 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Gillman provides many other examples of members of the founding generation arguing that constitutional rights were fixed in the absence of formal amendment. *See* Gillman, *supra* note 33, at 198-203; *see also* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 177-80 (1960) (discussing the commitment of the Framers to a "fixed constitution").

42. *See, e.g.*, JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at 77 (1995) (suggesting that David Brewer, the most vigorous proponent of laissez-faire jurisprudence on the Supreme Court, was influenced by natural rights precepts); Daniel R. Ernst, *Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885-1900*, 36 AM. J. LEGAL HIST. 19, 19 (1992) (stating that *Lochner* era judges acted to "uphold a system of values which they termed the free labor system"); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 782-86 (noting courts' reliance on "free labor" ideology); White, *supra* note 33, at 99-100 (discussing the importance of the free labor tradition in postbellum legal thought).

lation" that benefited politically powerful interest groups at the expense of the general public.[43]

Incorporating these traditions into the Fourteenth Amendment after the Civil War would have required substantial new limitations on the states' police power, and the Supreme Court initially refused to enforce such limitations. In the 1873 *Slaughter-House Cases*, a one-vote majority of the Supreme Court adopted a narrow reading of the Fourteenth Amendment and upheld an apparently monopolistic state statute.[44] The dissenters invoked the natural rights and anti-class legislation traditions to no avail.[45]

During the Fuller years, the Supreme Court was relatively vigilant in preventing state interference with interstate commerce,[46] but remained reluctant to rely on the Fourteenth Amendment to

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43. *See* MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837-1910, at 120 (1994) (reporting Justice David Brewer's recognition that state legislation often benefited interest groups, not the public at large); White, *supra* note 33, at 88-89 ("When courts used the Due Process Clauses to strike down 'social legislation' in the late nineteenth and early twentieth centuries, they were . . . doing so because the legislation in question had failed to demonstrate that it was an appropriately 'general' use of the police powers, as distinguished from an inappropriately 'partial' one."); Olken, *supra* note 39, at 46-47 (discussing Justice Sutherland's hostility to class legislation). The anti-class legislation tradition played a strong role in certain strands of Jacksonianism, which in turn influenced the courts. *See* ELY, *supra* note 42, at 76-77 (attributing Chief Justice Melville Fuller's support of laissez-faire ideas to Jacksonian influences and rejecting the hypothesis that Fuller was strongly influenced by Darwinism); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 33-44 (1993) (discussing the Jacksonian origins of laissez-faire jurisprudence); Michael Les Bendedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 298 (1985) (recognizing the Jacksonian origins of laissez-faire constitutionalism); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 973-74 (1975) (describing the influence of Jacksonianism on Justice Field); Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20, 26 (detailing the Jacksonian laissez-faire influence on judges who protected liberty of contract); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 249-50 (1997) (arguing that the framers and ratifiers of the Fourteenth Amendment intended it to be applied to stop class legislation). For another perspective, see HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 99-101 (1991) (contending that economic theory was the primary influence on judges espousing laissez-faire ideology).

44. 83 U.S. (16 Wall.) 36, 60-62 (1873) (upholding a law granting a monopoly to a slaughterhouse); Durbridge v. Slaughter-House Co., 27 La. Ann. 676, 676 (1875) (finding that a slaughterhouse had achieved its legal monopoly through bribery and corruption).

45. *See* Slaughter-House, 83 U.S. (16 Wall.) at 83-111 (Field, J., dissenting) (assailing the Act for the "exclusive privileges" it granted); *id.* at 111-24 (Bradley, J., dissenting) (discussing the natural rights tradition).

46. "[T]he Fuller Court relied on the Commerce Clause to strike down state laws in 56 cases, which constituted 31% of the cases raising Commerce Clause challenges." ELY, *supra* note 42, at 141 n.39.

invalidate this state legislation.[47] By the late nineteenth century, however, state courts invalidated economic legislation on class legislation and natural rights grounds with some regularity.[48]

In 1905, in *Lochner v. New York*, the Supreme Court finally adopted a moderate laissez-faire jurisprudence under the Fourteenth Amendment.[49] The Court ruled that a maximum hours law for bakers exceeded the states' police power and violated the right of liberty of contract protected under the Fourteenth Amendment's Due Process Clause.[50]

Justice Peckham wrote for the majority that if the Court upheld the regulation of bakers' hours, "it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid."[51] If the New York law could be sustained, added Peckham, all workers would be "at the mercy of legislative majorities."[52] Peckham added that, "it is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."[53] The court decided that because the law at issue in *Lochner* was not passed

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47. *See* Warren, *supra* note 20, at 669 (noting the paucity of cases in which the challengers of state legislation successfully relied on the Fourteenth Amendment). The Court implicitly repudiated *Slaughter-House* in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884), though with little practical effect before *Lochner*. Roscoe Pound later referred to *Butchers' Union* as the "fountain head" of the liberty of contract line of cases. *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 470 (1909) [hereinafter Pound, *Liberty of Contract*].

48. *See, e.g.*, Frorer v. People, 141 Ill. 171, 186-87 (1892) (finding statute outlawing "truck stores" unconstitutional and void because law cannot assume a class of people are incompetent to contract for own wages without proof of incapacity); Millet v. People, 117 Ill. 294, 301-05 (1886) (striking down a law requiring mine owners to have scales for weighing coal based on rights of miners to contract for price of their labor); *In re* Jacobs, 98 N.Y. 98, 112-15 (1885) (holding a law prohibiting the manufacture and preparation of tobacco in tenement houses void because application to classes showed it was not really a public health measure); Godcharles & Co. v. Wigeman, 113 Pa. 431, 437 (1886) (declaring an act that made a ton equal to 2000 pounds unconstitutional because it infringed on the rights of both employers and employees to contract for wages). *See generally* GILLMAN, *supra* note 43, at 86-99 (listing examples).

49. *See* 198 U.S. 45, 64-65 (1905) (invalidating a law limiting the hours of bakers), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

50. *See id.* Arguably, *Lochner* was implicitly overruled by *Bunting v. Oregon*, 243 U.S. 426, 429-30 (1917) (upholding a state law limiting hours of work as a public health measure), but was revived in *Adkins v. Children's Hosp.*, 261 U.S. 525, 561 (1923) (invalidating the District of Columbia's minimum wage law because it interfered with individual freedom to contract), and survived until *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (overruling *Adkins*, and with it *Lochner*).

51. *Lochner*, 198 U.S. at 60.

52. *Id.* at 59. It is worth noting Peckham's sophistication in implicitly distinguishing "legislative majorities" from popular majorities, an insight crucial to modern public choice theory. *See id.*

53. *Id.* at 64.

to protect the public health, or even the health of bakers, it was therefore a form of unconstitutional class legislation.[54]

Progressives such as Roscoe Pound, Ernst Freund, Learned Hand, and others accused the *Lochner* majority of engaging in "mechanical jurisprudence"[55] or abstract reasoning, instead of relying on modern scientific knowledge about the health effects of long hours on bakers.[56] In fact, however, the *Lochner* majority had some scientific evidence in its favor. The brief for Joseph Lochner contained in its appendix what Professor Stephen Siegel has called an "incipient 'Brandeis brief' compilation of medical, scientific, and statistical data,"[57] demonstrating that baking was not an especially unhealthful profession.[58]

Justice Harlan's dissent, joined by two other Justices, agreed that class legislation was unconstitutional but argued that the Court should have given more deference to the New York legislature's

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54. *See id.* at 62-63; *see also* White, *supra* note 33, at 98-99 n.28 ("Peckham's majority opinion in *Lochner* found the legislative judgment about 'general' burdens following from labor conditions in the baking industry to be either unfounded or pretextual. He therefore concluded that the statute was 'partial' and violated the anticlass principle.").

Sidney Tarrow has argued persuasively that the maximum hours provision was the product of an attempt by unionized bakers to force non-unionized bakeries to reduce their hours to union ones to eliminate the non-unionized bakeries' competitive advantage. *See* Sidney G. Tarrow, Lochner v. New York*: A Political Analysis*, 5 LABOR HIST. 277, 290-98 (1964).

55. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 616 (1908) [hereinafter Pound, *Mechanical Jurisprudence*] (attacking the Court for invalidating laws based on logical deduction rather than the effect the law had on a specific factual situation).

56. *See id.* ("The conception of freedom of contract is made on the basis of a logical deduction. The court does not inquire what the effect of such a deduction will be, when applied to the actual situation."); *see also* Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411, 416 (1905) (accusing the majority of relying on common sense at the expense of scientific evidence); Learned Hand, *Due Process of Law and the Eight Hour Day*, 21 HARV. L. REV. 495, 507 (1908) (claiming that changed conceptions of rights should lead to an expanded scope for the police power); *see also* Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 364 (1916) (accusing courts of relying on *"a priori* theories" and "abstract assumptions" in liberty of contract cases); George Gorham Groat, *Economic Wage and Legal Wage*, 33 YALE L.J. 489, 496 (1924) (contrasting Justices who were concerned with "what is logical" with those who were concerned with "what is scientific").

57. *See* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 18-19 n.77 (1991). Professor Siegel provides the following summary:

> Included in that material is a chart of comparative mortality figures from England in 1890 through 1892, which gave bakers a score of 920. Dock laborers scored highest at 1829, and clergymen scored lowest at 533. Railway engine drivers scored 810; barristers and solicitors scored 821; commercial clerks scored 915; publishers scored 833; master musicians scored 1214; and general laborers scored 1221. The residual category of "other occupied males" scored 847.

Id. (citations omitted).

58. *Cf. Lochner*, 198 U.S. at 59 ("We think there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one . . . .").

finding that the law was a public-spirited health measure.[59] Harlan cited several studies that supported this interpretation of the hours law.[60]

With the exception of Justice Holmes, who wrote a separate dissent, all of the *Lochner* Justices shared the traditional view that the judiciary must scrutinize legislation, including "Progressive" labor legislation, to ensure that it met constitutional norms.[61] Traditional jurisprudence thus became associated with support for at least the mild version of laissez-faire jurisprudence consistently favored by Harlan.[62]

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59. *See id.* at 72-73 (Harlan, J., dissenting). Justice Harlan wrote:

> We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect.

Id. at 73 (Harlan, J., dissenting).

60. *See id.* at 70-72 (Harlan, J., dissenting). One could argue, based on the studies cited by both the majority and Harlan's dissent, that baking was not an especially unhealthful profession, but that the marginal benefit to bakers' health from a reduction in their hours was relatively greater than a similar reduction in the hours of other workers. I thank Richard Friedman for raising this point.

61. *See* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 9-14 (1980) (arguing that the Justices, minus Holmes, agreed that the Court's main function was a limited one, te "carry out the objective task of classification").

As G. Edward White has noted: "[T]he distinction between 'general' and 'partial' legislation was the focus of all the Justices who decided *Lochner* except Holmes. It also informed the discussion of 'liberty of contract' that featured prominently in the opinion of the majority which invalidated the New York statute." White, *supra* note 33, at 97. White also noted that "[t]he framework from which Holmes approached *Lochner*, as well as other cases that have come to be called 'substantive due process,' was not taken seriously in orthodox legal circles." *Id.* at 87.

62. *Lochner* represented a victory for a more vigorous version of laissez-faire jurisprudence than Harlan supported. A more extreme version was rejected by the Court in *Holden v. Hardy*, 169 U.S. 366, 398 (1898) (rejecting a challenge to a law limiting the working hours of miners).

Holden itself implicitly repudiated *Slaughter-House*, because the majority agreed that class legislation was unconstitutional under the Fourteenth Amendment. The majority stated, "[t]he question in each case is whether the legislature has adopted the statute in question in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class." *Id.*

However, the majority in *Holden* was more willing to give state legislation the benefit of the doubt than were more radical jurists such as Justices Brewer and Peckham, each of whom dissented. *See* Siegel, *supra* note 57, at 8-23 (distinguishing among various schools of laissez-faire jurisprudence).

B. The Rise of Sociological Jurisprudence

Concomitantly with the rise of traditionalistic laissez-faire jurisprudence, jurisprudential theories that challenged the bases of traditional jurisprudence emerged as an intellectual force in constitutional law.[63] These theories eventually coalesced into what became known as sociological jurisprudence.[64] Sociological jurisprudence holds that the purpose of law is to achieve social aims, and that legal rules, including constitutional rules, cannot be deduced from first principles.[65] Accordingly, sociological jurisprudes believed abstract notions of rights should not bind judges.[66]

Sociological jurisprudes also believed that judges should not strictly rely on traditional analytical tools such as analysis of the Framers' intent, natural rights, or precedent when deciding

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63. *See, e.g.*, John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 24 (1892) (contending that law is the rules of conduct societies create to govern themselves); *cf.* William D. Lewis, *Civil Liberty and a Written Constitution*, 41 AM. L. REG. (O.S.) 1064, 1070-71 (1893) (arguing that some powers naturally belong to the legislature and should be considered granted if not expressly withheld).

64. According te G. Edward White, the first explicit use of the term "sociological jurisprudence" was made by Roscoe Pound in *The Need of a Sociological Jurisprudence*. G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 25 n.70 (1997) (citing Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907) [hereinafter Pound, *The Need of a Sociological Jurisprudence*]).

65. *See* Pound, *Liberty of Contract*, *supra* note 47, at 464. Pound defined "the sociological movement in jurisprudence" as:

> the movement for pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument.

Id.; *cf.* RUDOLPH VON JHERING, LAW AS A MEANS TO AN END 328 (Joseph H. Drake et al. eds. & Isaac Husik trans., 1913) ("A universal law for all nations and times stands on the same line with a universal remedy for all sick people. It is the long sought for philosopher's stene, for which in reality not philosophers but only the tools can afford to search.").

In this context, one should consider Herbert Hovenkamp's claim that the rise of sociological jurisprudence, and ultimately legal realism, was dependent on the formulation by legal Progressives of the false hypothesis that courts applying the principles of laissez-faire jurisprudence were "formalist." *See* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 382-83 (1988). That is, that they mechanically deduced first principles from existing precedents and applied them to the case at hand. *See id.* Hovenkamp suggests that while Langdellian common law jurisprudence was clearly formalist, there was no analogous public law jurisprudence. *See id.* at 383.

66. *See* Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 463, 467 (1916) (bemoaning the alleged abstract reasoning and legal formalism that led judges to invalidate reform legislation). One advocate of sociological jurisprudence described his school's view of rights this way:

> [I]n the viewpoint of the Sociological School . . . the inquiry should first be, what are the claims, the wants, the demands which the social group may make in order for its continued existence; and next, how far may the individual interests be recognized as appropriate thereto; the latter become legal rights if they should be recognized as appropriate.

E.F. Albertsworth, *Program of Sociological Jurisprudence*, 8 A.B.A. J. 393, 395 (1922).

constitutional cases with social import.[67] Instead, judges should consider the public interest and modern social conditions or "social facts" when interpreting the Constitution.[68] Advocates of sociological jurisprudence also argued that the rule of law itself would sometimes need to be sacrificed to extralegal concerns.[69]

One advocate of sociological jurisprudence defined it as "a square recognition by the courts that the constitutionality of social and economic legislation depended in the last analysis upon the actual existence or nonexistence of social or economic conditions justifying such legislation."[70] Traditionalists mocked this approach. Faced with an extensive "Brandeis Brief" supporting the constitutionality of minimum wage laws for women, Supreme Court Chief Justice Edward D. White remarked, " '[w]hy, I could compile a brief twice as thick to prove that the legal profession ought to be abolished.' "[71]

In stark contrast to traditional theories that relied on immutable principles such as natural rights, sociological jurisprudence depended on the theory that law was tied to the evolving nature of soci-

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67. *See, e.g.*, Albertsworth, *supra* note 66, at 396 ("Precedents should be guides to decision, rather than harsh unyielding masters."); Pound, *Liberty of Contract*, *supra* note 47, at 467 (suggesting that courts should not rely so heavily on the intent of the Framers because they only established general principles, not rules).

68. *See, e.g.*, Albertsworth, *supra* note 66, at 395-96 (suggesting that courts should deemphasize precedent as a basis for their decisions); Brandeis, *supra* note 66, at 464 (complaining that "the law has everywhere a tendency to lag behind the facts of life"); Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 706 (1913) [hereinafter Pound, *Justice*] (arguing against using inflexible jurisprudential theories because they fail to respond to changing times); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence, Part III*, 25 HARV. L. REV. 489, 515 (1912) [hereinafter Pound, *The Scope and Purpose of Sociological Jurisprudence, Part III*] (contending that legal rules should be a mere "general guide" to the judge, who should be free "within wide limits" to deal with the individual case as justice demands).

69. The leading publicist for sociological jurisprudence, Roscoe Pound, wrote that from time to time more or less "reversion to justice without law" becomes necessary in order to bring the administration of justice into touch with new moral ideas or changed social or political conditions. Pound, *Justice*, *supra* note 68, at 705-07; *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65 (1921) ("When the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in pursuit of other and larger ends.").

70. Robert Eugene Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 756 (1922). Cushman's belief was derived, in part, from the work of Rudolph von Jhering, who asserted that "[l]egislation will, in the future as in the past, measure restrictions of personal liberty not according to an abstract academic formula, but according to practical need." VON JHERING, *supra* note 65, at 409.

71. ALPHEUS THOMAS MASON, THE SUPREME COURT FROM TAFT TO WARREN 31 (1968). White, it should be noted, dissented in *Lochner*. That even he scoffed at the scientific pretensions of the legal Progressives demonstrates the extent to which the Supreme Court was filled with traditionalists until the New Deal. *See generally* White, *supra* note 33, at 118-20 (noting that as late as 1923, Holmes, and perhaps Brandeis, were the only Justices who shared the radical view that courts must defer to the legislature with regard to social legislation).

ety because society determined people's rights.[72] Sociological jurisprudes believed that courts should consider public opinion when interpreting the Constitution because such opinion represented the evolving social mores of the community.[73] Justice Holmes, for example, wrote that the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[74]

While sociological jurisprudence ultimately came to be associated with legal Progressivism, its underlying rationale did not inherently require judicial deference to the legislature. Christopher G. Tiedeman, considered the most pro-laissez-faire of all nineteenth-century constitutional treatise writers, shared many intellectual influences and philosophical positions with the proponents of sociological jurisprudence.[75] Perhaps most surprisingly, Tiedeman eschewed the notion that the Constituiton had a fixed meaning. Instead, he shared the sociological view that constitutional law could and should evolve by judicial decisionmaking based on public opinion.[76] Nevertheless, Tiedeman vigorously argued that the Fourteenth Amendment required courts to invalidate all manner of class legislation, from labor legislation favoring trade unions to anti-miscegenation laws.[77]

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72. *See* Gray, *supra* note 63, at 22-24 (stating that the power to seek court action constitutes legal rights). Oliver Wendell Holmes put it this way: "[I]f the will of the majority is unmistakable, and the majority is strong enough to have a clear power to enforce its will, and intends to do so, the courts must yield . . . because the foundation of sovereignty is power, real or supposed." *Book Notices*, 6 AM. L. REV. 132, 141 (1871).

73. *See, e.g.*, N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange over Legal Realism*, 1989 DUKE L.J. 1302, 1307-08 (noting that Roscoe Pound argued that judicial decisionmaking should be sensitive to public opinion); William Draper Lewis, *The Social Sciences as Basis of Legal Education*, 61 U. PA. L. REV. 531, 532-34 (1913) (arguing that because law reflects social ideas, it must change with those ideas).

74. Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911) (Holmes, J.).

75. *See* Thomas C. Grey, *Introduction* to CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES at iii, iii-vii (photo. reprint 1974) (1890) (noting that Tiedeman's jurisprudential theories resembled those of Roscoe Pound).

76. *See* Gillman, *supra* note 33, at 217-18 (noting that Tiedeman argned for judicial opinions to "obey 'the stress of public opinion or private interests' "); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1528-30 (stating that Tiedeman believed constitutional rules should change according to public opinion).

77. *See generally* David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93 (1990) (explaining that Tiedeman's laissez-faire constitutional theory failed because it did not deal adequately with the problem of protecting unenumerated constitutional rights). As political progressives began to dominate public opinion at the beginning of the twentieth century, however, Tiedeman's position became less tenable. Having no universalizable constitutional theories to rely on, Tiedeman got swept up in the agitation against big business. By 1900, Tiedeman favored

Tiedeman's pro-laissez-faire views were perfectly consistent with the methodology of sociological jurisprudence. He examined social conditions and public opinion and determined that enforcement of laissez-faire and the *sic utero* principle[78] would be in the public interest. Tiedeman sought to encourage courts to invalidate "class legislation" so that special interests would not use the political process to benefit themselves at the expense of the general public.[79] In the long-run, as the American political center shifted from the laissez-faire outlook of the two Cleveland administrations to the aggressive statism of Progressives Theodore Roosevelt and Woodrow Wilson, the statist version of sociological jurisprudence emerged dominant.[80]

The influence of the Progressive movement solidified the statist bent of the emerging sociological school of jurisprudence among legal scholars.[81] Progressivism emphasized collective action through government action,[82] and promoted the belief that efficient social engineering could lead to societal improvement.[83]

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government ownership of the banks, railroads, insurance companies, public utilities, and means of communications. *See* Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1383-84 (1990) (concluding that Tiedeman's philosophy changed from opposing government regulation to supporting it as the best means to preserve private property).

78. *Sic utere tuo ut alienum non lædes* means "use [your] own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1380 (6th ed. 1990).

79. Many years later, Felix Frankfurter revisited the principle of laissez-faire legislation. He recognized that most of society held the view that "arbitrary restriction of men's activities, unrelated in reason to the 'public welfare,' offends the Fourteenth Amendment." Frankfurter, *supra* note 56, at 369. However, Frankfurter also recoguized that there was significant dispute about how te apply this principle. *See id.*

80. *See* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 77-122 (1987) (explaining that by 1917 big government was firmly entrenched in America).

81. *See* ARTHUR A. EKIRCH, JR., THE DECLINE OF AMERICAN LIBERALISM 171 (1955) (discussing the nationalism of the Progressive movement).

82. *See id.*

83. *See* JOHN W. JOHNSON, AMERICAN LEGAL CULTURE, 1908-1940, 130 (1981) ("The Progressives were not afraid to distinguish good from bad, even to the degree of foisting their own moral standards on society as a whole.") Progressives could tout the benefits of social engineering because:

> progressivism began with the assumptions that society was in a constant state of flux and that man had the capacity to progress by directing this inevitable change toward beneficial ends. Consequently it affirmed the worth of evaluating social theories on the basis of contemporary experience. Such testing of the allegedly universal laws that governed intellectual disciplines often demonstrated their fallacy. The rules of the marketplace produced extreme poverty and outrageous wealth; they did not further progress. . . . In order to achieve progress government paternalism was needed to promote the common good.

G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1003 (1972).

By the turn of the century, Progressivism dominated American intellectual and political life.[84] Maximum hours laws, regulation of public utilities, pro-union legislation, and residential segregation laws were among the plethora of purportedly public-spirited legislation championed by mainstream Progressives. In the South, the racist and segregationist agenda was a crucial element of Progressivism.[85]

In the legal world, Progressive social thought combined with the emerging sociological school to form a powerful school of constitutional jurisprudence that challenged the foundations of traditional jurisprudence. Legal Progressives were sometimes overtly hostile to the Constitution because they believed that it represented the dead hand of the distant past. They argued that the Constitution should be amended, or, if that were not possible, ignored.[86] Other legal Progressives argued that legislatures, rather than courts, were in the best position to balance constitutional rights against the needs of the community. Legislatures, they argned, could fully take into account "social facts," whereas courts did not have the proper resources to do so, or, if they did, they were not so inclined.[87]

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84. *See* EKIRCH, *supra* note 81, at 171 (stating that the Progressive movement "dominated the American scene in the years from the turn of the century to United States entrance into World War I").

85. Arguably, southern Progressivism was inextricably linked with southern racism. Jack Kirby has argued that disfranchisement and segregation were the "seminal" progressive reforms of the era. *See* KIRBY, *supra* note 5, at 4. Similarly, Pete Daniels has asserted that the main purpose of southern Progressivism was to enact a racist agenda. The Progressive reforms passed in the South, such as child labor laws and prohibition, were simply a "veneer of progress" designed to hide "the racism, peonage, lynching, race riots, illiteracy, disease, and other ills that characterized the region." PETE DANIELS, STANDING AT THE CROSSROADS: SOUTHERN LIFE SINCE 1900, at 37 (1986). Thus, instead of uniting reformers in the South, Progressivism "became a major component in promoting white supremacy and solidarity and in maintaining African-American subordination and intimidation." NORALEE FRANKEL & NANCY S. DYE, GENDER, CLASS, RACE, AND REFORM IN THE PROGRESSIVE ERA 12 (1991). Some Progressives, of course, supported civil rights, but they had relatively little influence on Progressive Era politics.

86. *See, e.g.*, Groat, *supra* note 56, at 500 ("An eighteenth century constitution cannot, without change, be fitted to these twentieth century conditions.").

The hostility of legal Progressives toward the Constitution reflected general Progressive attitudes. *See* Herman Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 AM. J. LEG. HIST. 288, 288 (1971) (noting that "scholars such as Woodrow Wilson, J. Franklin Jameson, and Henry Jones Ford dissented from the reverential approval usually accorded the American constitution" because they believed the Constitution did not adequately address modern problems); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 954-55 (1996) (noting that Progressives saw the Constitution as the root of liberal individualism, which they believed caused inequality and division in society). Progressive hostility to the Constitution was given intellectual respectability by Charles Beard, who argued that the Framers of the Constitution intentionally favored the class interests of property-holders over the interests of the masses. *See* CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 15-18 (1956).

87. *See, e.g.*, Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) [hereinafter Pound, *Common Law*]. Pound stated

Either way, legal Progressives were inclined to argue in favor of judicial deference to the legislature. They argued that traditional notions of natural rights and opposition to class legislation should not bind the states' police power. Rather, they contended, the scope of the police power should change with the perceived needs of society. Modern, industrialized society necessitated increased government regulation, and the police power, therefore, needed to be expanded to accommodate this need.[88] As Progressives came to dominate sociological jurisprudence, they expunged the influence of those who, like Tiedeman, believed that courts should strictly enforce constitutional limitations on government power.[89] Ultimately, Progressive sociologi-

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> What court that passes upon industrial legislation is able or pretends to investigate conditions of manufacture, to visit factories and workshops and see them in operation, and to take the testimony of employers, employees, physicians, social workers, and economists as to the needs of workmen and of the public, as a legislative committee may and often does?

Id. at 405; Pound, *Liberty of Contract*, *supra* note 47, at 470 ("More than anything else, ignorance of the actual situations of fact for which legislation was provided and supposed lack of legal warrant for knowing them, have been responsible for the judicial overthrowing of so much social legislation."). Elsewhere, Pound explained that legislatures are better at balancing rights than courts who had "no machinery for getting at the facts." Courts did not have the advantage of reference bureaus, hearings before committees, or detailed expert testimony; only the legislature did. *See* Pound, *Mechanical Jurisprudence*, *supra* note 55, at 621-22.

Felix Frankfurter argued that, at the very least, courts must consider the relevant social science data before overruling a legislature that had access to such data. *See* Frankfurter, *supra* note 56, at 365; *see also* Gillman, *supra* note 33, at 220 (noting that "[o]ne of the tenets of 'sociological jurisprudence' was that legislatures were in the best position to collect the social data that was necessary to ensure that law would be adjusted so that it might contribute to developing social needs").

88. *Cf.* Albertsworth, *supra* note 66, at 394 (arguing that sociological jurisprudence had its origins in the courts' indifference to the upheavals caused by industrialization); *see also* MARK GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 51 (1991) (stating that leading progressive thinkers such as Roscoe Pound and John Dewey "insisted that public policy should promote the social interests of the community and that these interests could best be determined by elected officials and social science experts").

89. Tiedeman himself fell under the influence of Progressivism in the waning years of his career. *See* Halper, *supra* note 77, at 1353 (explaining Tiedeman's shift from an anti-government regulation stance to a pro-regulation stance).

The statism of sociological jurisprudence was influenced not only by Progressivism, but by lingering Darwinism. *See* Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 677-78 (1985) [hereinafter Hovenkamp, *Evolutionary Models*] (discussing the effect of Edward Ross's Darwinian ideas on Pound). These categories are not mutually exclusive. As historian Arthur Ekirch explains, Darwinism exercised considerable influence over many Progressives:

> Darwinism, interpreted by Herbert Spencer as a justification of laissez faire, with government refraining from interference with the normal evolution of society, was redefined in terms of Darwinism as social control. According to reformers, evolution was not primarily a story of individuals in a 'dog-eat-dog' competition with each other, but it indicated rather the success of individuals in a struggle with their environment. The lesson it taught was not laissez faire but social control. Instead of individuals being forced to adapt themselves to their environment, governments and reform agencies, the pro-

gressives believed, could help reshape the environment to meet the needs of individuals or of the species.

EKIRCH, *supra* note 81, at 180-81; *see also* Herbert Hovenkamp, *The Cultural Crisis of the Fuller Court*, 104 YALE L.J. 2309, 2311-12 (1995) (reviewing OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE (1994)) (discussing the statism of Progressive Darwinists).

Darwinism influenced sociological jurisprudence via three routes. First, two of Roscoe Pound's mentors, Edward Alsworth Ross and Lester Frank Ward, were Progressive Darwinists who believed in using law as an instrument of social control. *See* Hovenkamp, *Evolutionary Models*, *supra*, at 678. Hovenkamp has noted that "[i]n one of his more expansive moments Pound defined jurisprudence as a 'science of social engineering.' " *Id.* at 679.

Second, Progressives who were not lawyers applied Darwinism to constitutional theory. Woodrow Wilson, for example, wrote that while the Framers believed in mechanical, natural law theories, modern people recognize that "[s]ociety is a living organism and must obey the laws of life, not of mecbanics." WOODROW WILSON, THE NEW FREEDOM 48 (1913). He added: "All that progressives ask or desire is permission—in an era when 'development,' 'evolution,' is the scientific word—te interpret the Constitution according to the Darwinian principle . . . ." *Id.* Wilson also wrote that "government is not a machine, but a living thing. . . . It is accountable to Darwin, not to Newton." WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908).

Third, Oliver Wendell Holmes shaped sociological jurisprudence to a significant degree. *See* Pound, *Liberty of Contract*, *supra* note 47, at 464 (stating that the best exposition of sociological jurisprudence Pound had seen was found in Holmes's dissenting opinion in *Lochner*); Roscoe Pound, *Sociology of Law and Sociological Jurisprudence*, 5 U. TORONTO L.J. 1, 2-3 (1943) [hereinafter Pound, *Sociology of Law*] ("Sociological jurisprudence is in another line of development. It proceeds from historical and philosophical jurisprudence to utilization of the social sciences, and particularly of sociology, toward a broader and more effective science of law. It begins with Holmes . . . ."); *cf.* CARDOZO, *supra* note 69, at 138 ("It is the dissenting opinion of Justice Holmes, which men will turn to in the future as the beginning of an era. In the instance, it was the voice of a minority. In principle, it has become the voice of a new dispensation, which has written itself into law.").

The influence of Darwinism on Holmes was manifest from the early stages of his career. *See Book Notices*, *supra* note 72, at 141 ("[I]f the will of the majority is unmistakable, and the majority is strong enough to have a clear power to enforce its will, and intends to do so, the courts must yield . . . because the foundation of sovereignty is power, real or supposed."); *Summary of Events: The Gas Stokers' Strike*, 7 AM. L. REV. 558, 583 (1873) ("The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest."). Holmes's writing during his time on the Supreme Court continued to show the influence of Darwinism. *See* J. W. Burrow, *Holmes in His Intellectual Milieu*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 17, 25 (Robert W. Gordon ed., 1992) (explaining the origins of Holmes's Darwinian attitudes); Yosel Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 251 (1964) (finding that Holmes was a strong adherent to Darwinian doctrines); *cf.* HOVENKAMP, *supra* note 43, at 99 (denying Holmes was a social Darwinist, but conceding that Holmes was influenced by evolutionary theory, i.e., Darwinism).

Holmes's Darwinism led to his belief that if judges interfered with legislation, they illegitimately interfered with natural societal evolution. *See* Cass R. Sunstein, Lechner's *Legacy*, 87 COLUM. L. REV. 873, 880 (1987) (noting that Holmes "treat[ed] the political process as an unprincipled struggle among self-interested groups for scarce social resources").

The Darwinian influence on Holmes was apparent when he took issue with the *Lochner* majority's view that liberty included the liberty of the worker to contract freely. He stated that the word liberty in the Fourteenth Amendment "is perverted when it is held to prevent the natural outcome of a dominant opinion." Lechner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). The only exception to this rule, added Holmes, is if "a rational and fair man *necessarily* would admit that the statute proposed would infringe fundamental principles as they have been understeod by the traditions of our people and our law." *Id.* (Holmes, J., dissenting) (emphasis added). This

cal jurisprudence, while purporting to be scientific, in effect stood for statism in the form of judicial acquiescence to the whims of the legislature.

Justice Holmes's radical dissent in *Lochner* exemplifies the statism of sociological jurisprudence. In contrast to the traditional view that the Constitution was intended to limit government,[90] Holmes argued that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."[91] Holmes, in contrast to his eight Supreme Court colleagues, simply did not believe that liberty of contract was a constitutionally protected value.[92] The Fourteenth Amendment, Holmes famously wrote, "does not enact Mr. Herbert Spencer's Social Statics."[93]

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exception is almost meaningless. If a law represents the "natural outcome of a dominant opinion," it seems impossible that a rational person could believe the law was definitely inconsistent with the fundamental traditions of the nation.

Ironically, promoters of sociological jurisprudence accused their opponents of being Darwinists. Roscoe Pound wrote that "[r]evolt of the social conscience against such [Darwinian] theories" was an important factor in the development of the movement for the "socialization of law." Pound, *The Scope and Purpose of Sociological Jurisprudence, Part III*, *supra* note 68, at 496.

90. *See supra* notes 33-38 and accompanying text.

91. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

92. *Cf.* White, *supra* note 33, at 111 ("For Holmes 'liberty of contract,' itself a judge-made doctrine, was held subject to almost limitlessly broad police powers.").

93. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting); *see* White, *supra* note 33, at 93 ("The revolutionary feature of Holmes's *Lochner* dissent was his suggestion that, in most cases involving isssues of political economy, foundational constitutional principles are not implicated.").

Spencer favored the "law of equal freedom" as an overriding principle of political economy. The law of equal freedom holds that each person may use her faculties and property as she chooses, so long as she does not interfere with the equal right of other people to use their faculties and property. *See* HERBERT SPENCER, SOCIAL STATICS 92-93 (1965). The pronoun "she" is used intentionally here, as Spencer believed that the law of equal freedom applied to women as much as to men. *See id.*

Beginning with Pound, generations of scholars have asserted that Holmes was accusing the Court of subtly following Social Darwinism. *See* Pound, *The Scope and Purpose of Sociological Jurisprudence, Part III*, *supra* note 68, at 494 n.18. In fact, many scholars seem to rely on Holmes's dictum and scant other evidence in arguing that the entire jurisprudence of the *Lochner* era Court was heavily influenced by Social Darwinism. *See, e.g.*, DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 42 (3d ed. 1980) (observing that in the late nineteenth century the Supreme Court became "the major protector of propertied interests" at the expense of individual liberties); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 228 (2d ed. 1983) (noting that laissez-faire economics and Social Darwinism were "in vogue among American intellectuals in the mid-nineteenth century"); RICHARD HOFSTATER, SOCIAL DARWINISM IN AMERICAN THOUGHT 5-6 (rev. ed. 1955) (stating that Social Darwinism was used by "laissez-faire conservatives" to defend their opposition to social reform); CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS E. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW 24 (1954) (noting that the Holmes dissent was a critique of the transformation of due process into the protection of private economic power); PAUL KENS, JUDICIAL POWER AND REFORM POLITICS:

Holmes also eschewed traditional principles of American jurisprudence by consciously refusing to consider the issue of whether the statute at issue in *Lochner* was class legislation. Holmes acknowledged that if the law was justified as an appropriate first step toward regulating the hours of all workers, it may "be open to the charge of inequality."[94] Nevertheless, he thought it "unnecessary to discuss" this issue.[95]

Holmes's opinion became a statist shrine for Progressive legal theorists. Roscoe Pound glorified Holmes's opinion as the best exposition of sociological jurisprudence he had seen.[96] Pound and other Progressives reserved their praise for Holmes and largely ignored Harlan's dissent, even though Harlan's dissent was far more "scientific," than Holmes's. What Pound chose to celebrate was not a truly sociological opinion that grappled with the question of whether the maximum hours law in question was an appropriate health measure rather than class legislation, but a statist opinion which ignored constitutional protections entirely in favor of extreme deference to the legislature.

Meanwhile, Pound vigorously attacked the anti-statism of the majority opinion in *Lochner*. Not only did the Court misinterpret the relevant facts, according to Pound,[97] but it had a warped conception of

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THE ANATOMY OF *LOCHNER V. NEW YORK* 3-5 (1990) (asserting that the *Lochner* decision was important "because it signaled the Court's adoption of... laissez faire-social Darwinism"); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 235-37 (1960) (explaining that Social Darwinism became popular in the law after it was already in retreat in other disciplines); BENJAMIN TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 154 (1942); MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 104 (1949). In fact, when read in context, the *Social Statics* remark says only that the *sic utero* principle could not be the basis of American constitutional law. Holmes was simply using Spencer as an example of a prominent intellectual who believed the *sic utero* principle should be the basis of law. Holmes, however, was *not* accusing the Court of believing in Social Darwinism or of otherwise being influenced by Spencer, whose works Holmes had never read. *See* PHILIP P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 173 (1949) (noting that Holmes had never read Spencer).

Whether Spencer can even be considered a "Social Darwinist" is itself questionable. *See* JOHN GRAY, LIBERALISM 31 (1986) (describing Spencer as a classical liberal).

94. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

95. *Id.* (Holmes, J., dissenting).

96. *See* Pound, *Liberty of Contract*, *supra* note 47, at 464. Charles Beard, meanwhile, stated that Holmes's opinion was "a flash of lightning [in] the dark heavens of judicial logic." CHARLES BEARD, THE MIND AND FAITH OF JUSTICE HOLMES 148 (Max Lerner ed., 1943); *see also supra* note 89 and accompanying text (recounting other Progressives' praise of Holmes's dissent). Holmes was more of a majoritarian than a statist, but his views were appropriated by statists. I thank John Wertheimer for raising this point.

97. *See* Pound, *Liberty of Contract*, *supra* note 47, at 480 (asserting that study of the social situation at the time of *Lochner* shows that Congress interpreted the facts correctly); Pound, *Mechanical Jurisprudence*, *supra* note 55, at 616 (noting that the majority never inquired into

liberty. Pound had the intellectual's contempt for the ability of the layman to pursue his own ends appropriately. Freedom of contract in the hands of "weak and necessitous" bakers, wrote Pound, "defeats the very end of liberty."[98]

Traditionalists, by contrast, criticized Holmes's opinion. One author wrote that if Holmes's views were to prevail, "constitutional government, in the sense in which it has been understood for a century and a half, will be at an end, and the doctrine of the police power will have been swallowed up in the capacious maw of unrestrained democracy."[99]

Most Justices on the Supreme Court apparently agreed. Despite Holmes's *Lochner* dissent, the incipient rise of Progressivism, and the publication of a major treatise on the police power adopting the sociological view,[100] the Supreme Court mostly adhered to traditional constitutional jurisprudence and generally ignored the emerging sociological school and its emphasis on deference to the legislature. Only Holmes continued to insist that the Constitution was sufficiently malleable that the Court could and should almost always defer to the policy judgments of the legislature.[101]

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the factual results of its rule). In fact, Holmes paid far less attention to the facts than did either the majority or the other dissenting Justices.

98. Pound, *Liberty of Contract*, *supra* note 47, at 484. Pound's contempt for the liberty of contract doctrine can be found later in the same article:

> The attitude of many of our courts on the subject of liberty of contract is so certain to be misapprehended, is so out of the range of ordinary understanding, the decisions themselves are so academic and so artificial in their reasoning, that they cannot fail to engender such feelings .... The evil of those cases will live after them in impaired authority of the courts long after the decisions themselves are forgotten.

Id. at 487.

99. George W. Wickersham, *The Police Power, A Product of the Rule of Reason*, 27 HARV. L. REV. 297, 316 (1914).

100. *See generally* ERNST FREUND, THE POLICE POWER (1903). Freund defined the police power as "the power of promoting the public welfare by restraining and regulating the use of liberty and property." *Id.* at iii. An exercise of the police power was legitimate if it aided the public welfare, which he described as "the improvement of social and economic conditions affecting the community at large and collectively, with a view to bringing about 'the greatest good for the greatest number.' " *Id.* at 5.

Justice Brewer, in contrast, argued that the "timid judge" would invoke the police power "to escape the obligations of denouncing a wrong." BRODHEAD, *supra* note 43, at 117.

101. *See, e.g.*, Adair v. United States, 208 U.S. 161, 191-92 (1908) (Holmes, J., dissenting) (arguing that the Supreme Court should uphold a pro-labor union statute because Congress and others had concluded that unionization should be encouraged).

III. RACE, THE SUPREME COURT, AND THE POLICE POWER BEFORE *BUCHANAN*

After *Lochner*, opponents of segregation hoped that Jim Crow laws, at least as applied to the private sector, could be successfully challenged on liberty of contract grounds.[102] Civil rights advocates hoped that the traditionalism and anti-statism of *Lochner* would counteract the statism and the sociological reliance on racism of *Plessy v. Ferguson*.[103]

A. Plessy v. Ferguson: *The Sociological Jurisprudence of Race*

Plessy involved a Louisiana statute that required railroads to enforce racial segregation.[104] When the *Plessy* segregation ordinance was passed, segregation, by law or custom, was common throughout the South.[105] On the other hand, segregation was far from universal,[106] and it was under pressure from increased black assertiveness, urbanization, and the anti-caste influence of the market economy.[107]

By the 1890s, there was growing African-American resistance to de facto segregation. The common law required either integration or separate but equal accommodations, and African-Americans became increasingly aggressive about enforcing their rights in the courts.[108] Streetcar companies, train companies, and other enterprises sometimes found it more profitable to have integration than to

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102. *See, e.g.*, 9 BICKEL & SCHMIDT, *supra* note 4, at 731 (noting that Berea College hoped to draw support for continued integration from *Lochner*).

The several cases challenging state-imposed segregation to reach the Supreme Court dealt with transportation and education. None of them involved, as *Lochner* did, liberty of contract under the Due Process Clause of the Fourteenth Amendment. Rather, those cases challenged segregation regulations based on either the Commerce Clause or the Equal Protection Clause of the Fourteenth Amendment, and were uniformly unsuccessful. *See* Chesapeake & Ohio Ry. v. Kentucky, 179 U.S. 388, 390 (1900) (unsuccessful commerce clause challenge); Cumming v. Richmond Co. Bd. of Educ., 175 U.S. 528, 544 (1899) (unsuccessful equal protection challenge); Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (unsuccessful equal protection challenge); Louisville, New Orleans & Texas Ry. v. Mississippi, 133 U.S. 587, 592 (1890) (unsuccessful commerce clause challenge).

103. 163 U.S. at 551.

104. *Id.* at 540-41.

105. *See* Howard N. Rabinowitz, *More Than the Woodward Thesis: Assessing* The Strange Career of Jim Crow, 75 J. AM. HIST. 842, 850 (1988) (contending that de jure segregation arose in response to black challenges to de facto exclusion and segregation).

106. *See* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1882 n.7 (1995) (listing and describing sources that discuss the extent of integration in the South when *Plessy* was decided).

107. *See* Rabinowitz, *supra* note 105, at 850.

108. *See* EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH 141-42 (1992).

maintain separate but equal accommodations.[109] Streetcar systems, therefore, were often integrated, as were some trains.[110]

In an attempt to win support from their white constituents, politicians began to propose laws requiring separate public accommodations.[111] The Louisiana segregation law at issue in *Plessy* was one of the first fruits of this flurry of legislative activity. The American Citizens' Equal Rights Association of Louisiana vigorously opposed the segregation statute while it was pending.[112] The Association denounced the bill as "class legislation."[113] When it became law anyway, the Association set out to challenge its constitutionality. With the cooperation of the local train company, which also opposed the statute, the Association arranged Homer Plessy's arrest for violating the law to create a test case.[114]

The *Plessy* majority argued that the Louisiana statute did not violate Plessy's rights under the Equal Protection Clause.[115] The Court reasoned that segregation, while creating a distinction between the races, was not discriminatory.[116] The statute restricted whites to the same degree as African-Americans; African-Americans could not choose to sit with whites, and whites could not choose to sit with

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109. *See* Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. ECON. HIST. 893, 899 (1986) (noting tbat streetcar companies frequently complained about forced segregation because of lost profits).

110. *See id.* (discussing the integration of streetcars).

111. *See* Rabinowitz, *supra* note 105, at 850. Some of the earliest train segregation laws also received some support from African-Americans because they purported to prevent train companies from providing African-Americans with inferior accomodations. *See* AYERS, *supra* note 108, at 143-44.

Ayers lucidly explained the impetus behind white support for railroad segregation laws. In essence, upper-class whites who rode in the railroads' first-class cars could not tolerate associating with African-Americans in mixed-sex company. *See id.* at 140-41.

112. *See* AYERS, *supra* note 108, at 144. African-American support for such laws had apparently declined when it became clear that the equal part of separate but equal was rarely enforced. *See id.* at 145.

113. *See* Donald Nieman, *From Slaves to Citizens: African Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115, 2135 (1996). African-American leaders often criticized train segregation laws as examples of "class legislation." CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION 28 (1987). For example, an 1891 meeting attonded by some 600 Little Rock, Arkansas, blacks passed resolutions that denounced a proposed separate coach bill as "caste and class legislation, which has no place in our country." Nieman, *supra*, at 2136.

114. *See* LOFGREN, supra note 113, at 43 (describing the details of Homer Plessy's prearranged arrest).

115. *See* Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896).

116. *See id.* at 543 ("A statute which implies merely a legal distinction . . . has no tendency to destroy the legal equality of the two races.").

African-Americans. If African-Americans believed this arrangement to be subordinating, that was no concern of the Court.[117]

Plessy's counsel, Albion Tourgée, apparently anticipated that the Court might find that "mere" segregation did not violate African-American rights. Tourgée therefore seized upon Plessy's legal status as a "Negro" with mostly Caucasian ancestry, and argued that the statute violated Plessy's property right in his reputation as a white man.[118] The Court rejected this argument. The Court reasoned that if Plessy was in fact white, and was assigned to the "colored coach," he would have a cause of action against the company. If, on the other hand, he was "a colored man," there was no property deprivation "since he [was] not lawfully entitled to the reputation of being a white man."[119]

The holding that mere segregation did not create a cause of action under the Fourteenth Amendment is unremarkable. The Court's distinction between social rights, which were not protected by the Fourteenth Amendment, and civil rights, which were protected, was arguably consistent with the intent of the Framers of the Fourteenth Amendment.[120] Moreover, given the Court's general reluctance to overturn state legislation under the Fourteenth Amendment at this time, it would have been surprising, though hardly illogical, if the Court had followed dissenting Justice Harlan's lead and found that railroad segregation laws inherently amounted to illicit class legislation.[121]

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117. *See id.* at 551-52 (noting that any "badge of inferiority" is present "solely because the colored race chooses to put that construction on it").

118. Plessy was one-eighth "Negro," and had a Caucasian appearance. *See* LOFGREN, *supra* note 113, at 32 ("[T]he mixture of colored blood [was] not discernible.").

119. *Plessy*, 163 U.S. at 549.

120. *See id.* at 551-52 (distinguishing social rights from civil rights). Justice Brown, writing for the Court, argued that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.* at 544. Justice Brown noted that Congress had authorized segregated public schools in the District of Columbia. *See id.* at 545. Several modern sources discuss the historical distinctions between civil rights, political rights and social rights. *See, e.g.*, HOVENKAMP, *supra* note 43, at 93-94 (distinguishing between the right to equal treatment under civil procedure and economic civil rights); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 299-300, 395-97 (1982) (distinguishing civil rights from civil liberties, political rights, and social rights); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1014-23 (1995) (distinguishing between political rights and social rights).

121. One scholar has argued that "[i]f the Supreme Court had taken the same laissez-faire attitude teward race relations that it took in economic affairs in these decades, voluntary integration would have survived as a counter tradition to Jim Crow." Alan F. Westin, *The Case of the Prejudiced Doorkeeper*, *in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 139, 155-56 (John A. Garraty ed., rev. ed. 1987). This claim is anachronistic, because the major transporta-

The Court, however, also gratuitously implied that segregation laws were always constitutional if reasonable[122] and seemingly endorsed such laws on policy grounds. Even if segregation laws did go beyond "mere" legal distinction and violated the rights of African-Americans, the Court found they were well within the police power.[123] In reaching this conclusion, the Court relied less on traditional legal analysis and more on its perception of social reality. The Court had apparently assimilated the contemporary social science notion that blacks and whites, as members of distinct races, were instinctively hostile to one another.[124] Justice Henry Billings Brown wrote for the majority: "Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."[125]

The Court also argued, contrary to traditional theory, that courts should consult public opinion and public mores when determining the constitutionality of legislation. "In determining the question of reasonableness," Justice Brown wrote, "[the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their

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tion segregation cases were decided between 1890 and 1900, before the *Lochner* Era began; between 1887 and 1900, over 90% of the Court's Fourteenth Amendment decisions favored the state. *See* LOFGREN, *supra* note 113, at 80. Lofgren noted that "the approach that the Court took to state economic and social regulations paralleled and anticipated its treatment of restrictions on blacks." *Id.*

122. In fact, this is how contemporary commentators understood *Plessy*. Charles W. Collins, author of *The Fourteenth Amendment and the States*, stated that under *Plessy* "[t]here seems to be no limit to which a State may go in requiring the separation of the races." CHARLES W. COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 72 (1912).

123. *Plessy*, 163 U.S. at 544.

124. *See* PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 29 (1972) ("In the *Plessy* case, which became the constitutional foundation of racial segregation for fifty-eight years, the Court used extralegal facts implicitly derived from the current popularized understanding of social science."). *See generally* THE DEVELOPMENT OF SEGREGATIONIST THOUGHT 29-62 (I. A. Newby ed., 1968) (collecting primary sources reflecting theories of black inferiority and the existence of a natural racist instinct); STEPHEN J. GOULD, THE MISMEASURE OF MAN 1 (1996) (same); 1 LOUIS RUCHAMES, RACIAL THOUGHT IN AMERICA 441-97 (1969) (same).

125. *Plessy*, 163 U.S. at 551. The Court's emphasis on racial instincts was consistent with contemporary social thought. *See, e.g.*, HENRY M. FIELD, BRIGHT SKIES AND DARK SHADOWS 153 (1890). Field explains:

> It is not that one race is above the other, but that the two races are different, and that, while they may live together in the most friendly relations, each will consult its own happiness best by working along its own lines. This is a matter of instinct, which is often wiser than reason. We cannot fight against instinct, nor legislate against it; if we do, we shall find it stronger than our resolutions and our laws.

Id. Alfred H. Stone, *Is Race Friction Between Blacks and Whites in the United States Growing and Inevitable?*, 13 AM. J. SOC. 676, 677 (1908) (arguing that there is a "natural contrariety, repugnancy of qualities, or incompatibility between individuals or groups which . . . we call races.").

comfort, and the preservation of the public peace and good order."[126] The Court contended, no doubt correctly, that white public opinion was hostile to integration. Justice Brown stated that the plaintiff's argument assumed "that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races."[127] Focusing again on public opinion, the Court found that laws enacted contrary to public opinion could not achieve or promote "social equality."[128]

One can easily forget when reading Justice Brown's opinion in *Plessy* that the plaintiff was not asking for state-"enforced commingling of the races," but for a ban on government compelled segregation.[129] Apparently, Louisiana whites were not sufficiently hostile to mingling with African-Americans to engage in voluntary non-statist collective action to persuade train companies to voluntarily enforce segregation.[130] If whites, for example, had boycotted integrated trains, or demonstrated a willingness to pay higher prices for tickets in whites-only cars, train companies would likely have enforced segregation because the losses from integration would have been greater than the expenses of enforcing segregation.[131]

Faced with the problem that most whites favored segregation, but not strongly enough to overcome market pressures that sometimes led to integration, the Court chose to ignore the distinction between state action and private action.[132] The *Plessy* Court implicitly reasoned that *allowing* train companies to maintain integrated trains by failing to require segregation, would be the equivalent of legislation *forcing* whites and blacks to commingle.[133] By requiring segrega-

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126. *Plessy*, 163 U.S. at 550.

127. *Id.* at 551.

128. Justice Brown wrote that social equality could neither " 'be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate.' " *Id.* (quoting People v. Gallagher, 93 N.Y. 438, 448 (1883)).

129. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS 107 (1992); *see* JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY 1890-1920, at 83 (1978) (discussing the "fuzzy" reasoning used in the *Plessy* opinion).

130. *See* Mark Tushnet, Plessy v. Ferguson *in Libertarian Perspective*, 16 LAW & PHIL. 245, 248-49 (1997).

131. For an elaboration of this argnment, see EPSTEIN, *supra* note 129, at 102-03. These costs included the potential loss of African-American patronage, the maintenance of separate facilities, and lawsuits by whites mistaken for African-Americans.

132. Many years later, of course, ignoring this distinction became fashionable among legal realists, and, ultimately, adherents of Critical Legal Studies. For an extreme example, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 206-08 (1992).

133. It is true, of course, that if a white person needed to ride on a particular railroad, and that railroad permitted integration, the white traveller was in a sense "forced" to mingle with African-Americans. My point here is that it was not state action that created this situation, unless one considers inaction by the state to be state action.

tion, Louisiana simply restored the natural social order in defiance of the unnatural interference of the free market and the profit motive.[134]

Given its reliance on social science and public opinion and its disavowal of the state action distinction, the majority opinion in *Plessy* is at least in part an example of sociological jurisprudence run amok, of drunk Philip getting his way.[135] In contrast, Justice Harlan's famous dissent relied on traditional jurisprudential reasoning.[136] Harlan argued that public opinion and public policy considerations should not affect the constitutionality of legislation;[137] and, once one

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Ironically, by the 1940s civil rights activists who favored public accomodations laws were making arguments regarding state action analogous to those made by the *Plessy* Court. *See, e.g.*, Carey McWilliams, *Race Discrimination and the Law*, 9 SCI. & SOC'Y 1, 15 (1945) ("Civil rights acts undoubtedly have the effect of coercing those persons who like to attond places of public accommodation and amusement into what is to some of them distasteful contact. But *non-action on the part of a legislature is equivalent to sanctioning* the existing state of affairs. . . .").

134. One cannot help hut notice the similarities between the Court's reasoning in *Plessy* and the Court's reasoning in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the case that marked the demise of traditional jurisprudence in the context of the Fourteenth Amendment and economic regulation. For the majority in *West Coast Hotel*, a government's failure to enact a minimum wage law results in a subsidy for "unconscionable employers." *Id.* at 399. A minimum wage law, then, rather than being illicit government intervention in the marketplace, actually restores neutrality to an economy corrupted by the profit motive. Analogously, in *Plessy*, a segregation law, rather than being illicit government intervention in the marketplace, actually restores neutrality to an economy corrupted by the profit motive. *See* Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896).

135. Barton J. Bernstein came very close to understanding this point. *See* Barton J. Bernstein, Plessy v. Ferguson*: An Example of Conservative Sociological Jurisprudence*, 48 J. NEGRO HIST. 196, 196-97 (1963) (discussing the influence of "social theories" on the *Plessy* court).

136. Justice Brewer did not participate in *Plessy*, leaving open the intriguing question of whether he would have followed his jurisprudential philosophy and joined Harlan's opinion, joined the majority opinion, or written his own opinion. Brewer wrote the opinion holding that a Mississippi statute that required segregated trains did not unconstitutionally burden interstate commerce, *Louisville, New Orleans & Texas Ry. Co. v. Mississippi*, 133 U.S. 587 (1890), as well as the opinion in *Berea College v. Kentucky*, 211 U.S. 45 (1908), see *infra* notes 143-76 and accompanying text, which certainly suggests that he was not unalterably opposed to segregation laws. On the other hand, it is hard to imagine that Brewer would have been comfortable with Justice Brown's sociological majority opinion in *Plessy*, and his refusal to decide *Berea College* on police power grounds suggests that he may not have been willing to concede that segregation ordinances fall within the police power. For further speculations on how Brewer would have voted in *Plessy*, see J. Gordon Hylton, *The Judge Who Abstained in* Plessy v. Ferguson*: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315, 336-44 (1991).

137. *Plessy*, 163 U.S. at 558 (Harlan, J., dissenting) ("But I do not understand that the courts have anything to do with the policy or expediency of legislation."). A valid statute, according to Harlan, may be unreasonable, just as an invalid statute may represent sound public policy. *See id.* (Harlan, J., dissenting). Justice Harlan expressed similar sentiments in his dissent in *Lochner*: "Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation." Lochner v. New York, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting), *overruled by West Coast Hotel*, 300 U.S. at 379. Justice Peckham also expressed similar sentiments in the majority opinion in *Lochner*:

ignored public policy considerations, the segregation statute was clearly invalid as a gross example of illicit class legislation.[138]

Harlan was on particularly firm ground in arguing that the majority opinion endorsed class legislation because that opinion was based entirely on an endorsement of separation with no concern for equality. Although the statute at issue required equal accommodations for each race, the majority opinion never mentioned this requirement, and it appears to have played little role in the majority's reasoning.[139]

> If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? And that question must be answered by the court.

Id. at 57.

138. *See Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

> But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Id. Fiss noted the connection between Harlan's majority opinion in *Adair v. United States*, 208 U.S. 161 (1908), invalidating a ban on yellow dog contracts, and his opinion in *Plessy*. *See* OWEN M. FISS, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 365-66 (1993). In *Adair*, the government was trying to enhance the power of one group, labor, at the expense of another, employers. *See Adair*, 208 U.S. at 175. The Louisiana statute similarly favored one group, whites, over another, blacks. *See* FISS, *supra*, at 363. Fiss does not use the term, but both statutes were examples of "class legislation."

139. *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 468-69 (1982) (stating that while " 'separate but equal' was the style of the later apologetics of constitutional racism, it cannot be found in the rationale of *Plessy v. Ferguson*"); *see also* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 230 (1991) (noting the absence of an explicit "separato but equal" rationale in *Plessy*).

The *Plessy* Court stated that "[i]f one race be inferior te the other socially," the Constitution had nothing to say about it. *Plessy*, 163 U.S. at 552. Thus, it is entirely possible that if a challenge had been brought to a segregation statute that allowed unequal accommodations in 1896, the majority would have found that the law appropriately prevented the "enforced commingling" of the races, and also appropriately left it up to the train companies to decide privately how luxurious the whito and "Negro" cars should be. It is true that regardless of the constitutional issues involved, unequal railroad accomodations may have been illegal under the Interstate Commerce Act. *See, e.g.*, Edwards v. Nashville C. & St. L. Ry., 12 I.C.C. 247, 249 (1907) (holding that the failure to provide African-Americans with equal first-class facilities violated the Act). On the other hand, by 1910 the Interstate Commerce Commission was deferring "almost entirely" to railroad policies that were flagrantly unequal. Klarman, *supra* note 14, at 936. Klarman argues that the *Plessy* Court believed that separate-but-unequal was constitutional as long as the inequality was reasonable. *See id.* at 897-98; *cf.* Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 544 (1899) (upholding a Georgia county's decision to fund a white high school, while closing down an African-American high school).

Interestingly, unlike the U.S. Supreme Court, the Louisiana Supreme Court emphasized that the statute guaranteed equal accommodations when it upheld the *Plessy* segregation statute. *See Ex parte* Plessy, 11 So. 948, 950 (La. 1892) ("[The statute] impairs no right of passengers of either race, who are secured that equality of accommodations which satisfies every reasonable claim."), *aff'd*, 163 U.S. 537 (1896).

Thus, contrary to the opinions of some commentators,[140] *Plessy* did not represent traditional jurisprudence of the type that carried the day in *Lochner*, particularly when the Court discussed why segregation statutes come within the police power.[141] Instead, the opinion's reliance on social science and public opinion was an example of an early triumph of the emerging sociological school of jurisprudence.[142] In fact, *Lochner* served as the springboard for the next major challenge to a segregation ordinance.

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140. Owen Fiss has argued that the Supreme Court upheld the segregation statute at issue in *Plessy* because it "codified and strengthened existing social practices." FISS, *supra* note 138, at 362. The Court invalidated the statute at issue in *Lochner* because that law, by contrast, "tried to reverse social practices that were driven by market competition." Cass Sunstein has made the similar argument that *Lochner* and *Plessy* were consistent in that both "relied on a conception of neutrality taking existing distributions as the starting point for analysis." Sunstein, *supra* note 89, at 48. Along the same lines, Derrick Bell has contended that the decisions were consistent because they both "protected existing property and political arrangements, while ignoring the disadvantages to the powerless caught in those relationships: the exploited whites (in *Lochner*) and the segregated blacks (in *Plessy*)." Derrick Bell, *Does Discrimination Make Economic Sense?*, 15 HUM. RTS. 38, 42 (1988).

Bruce Ackerman has alluded to "*Plessy*'s deep intellectual indebtedness to the laissez-faire theories express one decade later in cases like *Lochner*." BRUCE ACKERMAN, WE THE PEOPLE 147 (1991). In support of his thesis, Ackerman relies on the Court's statement that if the two races are to mingle, it must be "the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." *Plessy*, 163 U.S. at 551. Brook Thomas has also blamed the *Plessy* ruling on laissez-faire ideology. He has argued that laissez-faire theory led the Court to seek to encourage the "natural" forces of segregation. *See* Brook Thomas, *Introduction: The Legal Background*, *in* PLESSY V. FERGUSON: A BRIEF HISTORY WITH DOCUMENTS 1, 34 (Brook Thomas ed., 1997).

141. While the intellectual acrobatics described in the previous footnote warm the hearts of modern Progressives who wish to decry both *Plessy* and *Lochner*, the *Plessy* Court was objecting to the integrating function of the market. The *Plessy* Court believed that the Louisiana segregation law simply restored things to their natural, pre-market state. *See supra* notes 132-34 and accompanying text. Surely this view, that the results of unregulated market processes are somehow unnatural and should therefore be corrected by state action, is not reflected in *Lochner*. *See* EPSTEIN, *supra* note 129, at 91-115; Tushnet, *supra* note 130, at 250-54 ("A decade after *Lochner* . . . its libertarianism seems to have become rather full-fledged with respect to African-Americans. A decade before *Lochner*, libertarianism did not have as much bite. Had it been deployed in *Plessy*, the result would have been different."); *cf.* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 787 (1992) ("The outcome in *Plessy* is mainly attributable to the virulent racism of the Gilded Age, not to the era's skepticism of activist government."); Silas Wasserstrom, *The Empire's New Clothes*, 75 GEO. L.J. 199, 303 (1986) (comparing the activism of *Lochner* with the passivism of *Plessy*). Thus, *Lochner* and *Plessy* are jurisprudentially at odds.

142. *Cf.* Bernstein, *supra* note 135, at 198-99 (noting the *Plessy* court's reliance on social science and the "Folkways of the people"). Years later, Charles Collins defended *Plessy* on the ground that the opinion "enunciate[d] sound principles of political science and [was] justified by the logic of history and of fact." COLLINS, *supra* note 122, at 72.

B. Berea College v. Kentucky: Lochner *vs.* Plessy

In 1904, Kentucky State Representative Carl Day introduced a bill into the legislature that prohibited African-American and white students from attending the same school, public or private.[143] The bill was clearly aimed at Berea College, a small, private, racially integrated school[144] and the only institution of higher learning in Kentucky that accepted blacks other than the all-black Kentucky State Industrial College.[145]

Day's bill was a politically entrepreneurial venture; few if any of his constituents had any contact with distant Berea College.[146] The bill was nevertheless a politically savvy ploy, as opposition to racial equality had become a popular political platform throughout the South.[147] Dominant white opinion opposing integration was reflected in the *Louisville Courier-Journal*, which complained that at Berea "white and colored girls and boys associate together in class-rooms, dining halls, in dormitories and on playgrounds, as well as in social entertainment."[148] Day may have decided to capitalize on the growing Southern opposition to racial integration by introducing the bill after President Theodore Roosevelt shocked and appalled Southern whites by dining with Booker T. Washington at the White House.[149]

The Day bill was unstoppable in the election year of 1904. The *New York Evening Post* stated that "any man who voted in opposition would have the 'n----r question' brought up against him in all his future career."[150] Even legislators personally opposed to the law felt obligated by political considerations to vote for it.[151] Some legislators expressed concern that the law violated Berea's property rights, but political expediency overcame that concern.[152]

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143. Richard A. Heckman & Betty J. Hall, *Berea College and the Day Law*, 66 REGISTER KY. HIST. SOC'Y 35, 35 (1968).

144. Some of Berea College's fascinating history is recounted in Jacqueline G. Burnside, *Suspicion Versus Faith: Negro Criticisms of Berea College in the Nineteenth Century*, 83 REG. KY. HIST. SOC'Y 237 (1985).

145. *See* Jennifer Roback, *Rules v. Discretion:* Berea College v. Kentucky, 20 INT'L J. GROUP TENSIONS 47, 51 (1990). Tennessee had recently passed a similar law forcing Maryville College to end its policy of integration. *See* Scott Blakeman, *Night Comes to Berea College: The Day Law and the African-American Reaction*, 70 FILSON CLUB HIST. Q. 3, 26 n.45 (1996) (noting that Maryville College became segregatod in 1903 as a result of the Tennessee statute).

146. *See* Heckman & Hall, *supra* noto 143, at 38-42.

147. *See id.* at 35-37.

148. *Id.* at 42 (quoting LOUISVILLE COURIER-JOURNAL (Feb. 2, 1904).

149. *See id.* at 38 (discussing this bypothesis).

150. *Id.* at 37.

151. *See id.* at 37-38.

152. *See id.* at 40 (noting tbat many were unconvinced by these legislators' concerns).

Berea College first challenged the law unsuccessfully in the Circuit Court of Madison County.[153] On appeal, the Kentucky Court of Appeals upheld the law as a valid police power measure.[154] The court reasoned that the law was a valid exercise of the state's well established power to prohibit miscegenation. Even a prejudicial motivation would not make a law invalid because prejudice was deemed "nature's guard to prevent the amalgamation of the races."[155] The court also argued that the law was valid because it would prevent the violence that integration of the races would inevitably produce.[156]

The Kentucky court added that the rights of private property and private association could not overcome the state's right to exercise its police power to enforce segregation. True to the Progressive spirit of the times, the court gave short shrift to autonomy claims by private institutions against the force of the state.[157]

Despite the incredibly poor racial climate,[158] the college decided to take its case to the Supreme Court. In its brief, Berea focused on the College's right and the right of its employees to be free from unreasonable interference by the state in pursuing their business and occupations.[159] Berea noted that the Supreme Court recognized such a

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153. The court stated that the law came within the state's police power because of the inherent tensions of interracial education. *See* Commonwealth v. Berea College, No. 6009 (Madison Cty. Cir. Ct. Feb. 7, 1905). The court added that segregation would prove to be "a blessing to Berea College, and to the colored as well as to the white youth of Kentucky." *Id.* at 18-19.

154. *See* Berea College v. Commonwealth, 94 S.W. 623, 628-29 (Ky. 1906). The court did invalidate a clause prohibiting the college from opening a branch within 25 miles of the main campus. *See id.* at 628.

155. *Id.* at 626.

156. *See id.* at 626-27 (discussing the likely violence that would result if the races are not kept separate).

157. We cannot agree that the ground of distinction noted [i.e., voluntary association] could form a proper demarcation between the point where the [police] power could form a proper demarcation between the point where the power might be exercised, and the one where it might not be.... All this legislation was aimed at something deeper and more important than the matter of choice. Indeed, if the mere choice of the person to be affected were the only object of the statutes, it might well be doubted whether that was at all a permissible subject for the exercise of the police power.

Id. at 626.

158. For example, in well-publicized remarks, the president of Harvard University urged Berea College President William Frost te yield te the Day Law. Among other pro-segregation comments, Eliot stated:

Perhaps if there were as many Negroes here as there, we might think it better for them to be in separate schools. At present Harvard has about five thousand white students and about thirty of the colored race. The latter are hidden in the great mass and are not noticeable. If they were equal in numbers or in a majority, we might deem a separation necessary.

THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 285-286 (1963).

159. *See* Brief of Plaintiff in Error at 5, Berea College v. Kentucky, 211 U.S. 45 (1908) [hereinafter *Berea* Plaintiff's Brief].

right in *Lochner* and other cases.[160] Specifically, Berea argued that "a private school stands upon exactly the same footing as any other private business [and that the] statute is . . . an arbitrary interference with the rights of the people in the conduct of their private business and in the pursuit of their ordinary occupations."[161]

The college then turned to the argument that the statute constituted illicit class legislation. Berea claimed that "[t]he Constitution makes no distinction between the different races or different classes of the people" and that any such distinction "must be done by the legislature in the exercise of the police power."[162] Although Berea acknowledged that certain segregation laws had been held to be within the police power, the college distinguished *Plessy* and other segregation cases on the ground that the laws in question in those cases had the purpose of preventing whites from involuntarily associating with African-Americans in trains and other places of public accommodation.[163] No whites, however, needed to come in contact with African-Americans at Berea College, since white students could easily attend another college that was not integrated.[164] Once the Court recoguized that any association between whites and African-Americans at Berea College was voluntary, the statute could not be justified under the police power.[165]

Overall, Berea's brief is an excellent example of legal argument relying on traditional jurisprudential notions. By contrast, Kentucky's brief mamfested the statist infiuence of Progressivism and sociological jurisprudence: "The welfare of the State and community is paramount to any right or privilege of the individual citizen. The rights of the citizen are guaranteed, subject to the welfare of the State."[166]

Kentucky spent siguificant effort attempting to persuade the Court to take judicial notice that African-Americans are mentally

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160. *See id.* at 11.

161. *See id.* at 10. It is worth noting that a similar argument emerged victorious in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (McReynolds, J.), a case decided at the height of the *Lochner* era.

162. *Berea* Plaintiff's Brief, *supra* note 159, at 15.

163. *See id.* at 25.

164. *See id.*

165. [N]or can the voluntary association of persons of different races, or persons of the same race, be constitutionally prohibited by legislation unless it is shown to be immoral, disorderly, or for some other reason so palpably injurious to the public welfare as to justify a direct interference with the personal liberty of the citizen; and even in such a case the restriction should go no further than is absolutely necessary.

Id. at 25.

166. Brief for Defendant in Error at 1, Berea College v. Kentucky, 211 U.S. 45 (1908).

inferior to whites. "This is not the result of education," Kentucky argued, "but is innate and God-given; and therein lies the supremacy of the Anglo-Saxon-Caucasian race."[167] To uphold liberty of contract in the context of education, the state suggested, would be to ignore obvious social facts.[168]

The Court was faced with a stark choice between the principles of *Lochner* and the principles of *Plessy*, and, more broadly, between traditional jurisprudence and sociological jurisprudence. In the end, the Court chose to evade the dilemma by upholding the Day law on the narrowest possible grounds.[169] It sidestepped the contradictions between forced segregation and freedom of contract by ruling that because Berea College was established under state charter, the state could regulate it in any way it chose as long as it did not violate the original wording of the charter—"the education of all persons who may attend."[170] Justice Brewer, writing for the Court, pointed out that the college could still educate all persons if African-Americans and whites were separated.[171]

Justice Harlan, joined by Justice Day, dissented. Harlan argued that the statute violated the college's and its employees' rights to freedom of contract and occupational liberty. He wrote:

> The right to impart instruction . . . . is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties," and "to be free to use them in all lawful ways."[172]

Unlike Justices Harlan and Day, the legal academy applauded the decision.[173] The law review commentary on *Berea College* reflected the strong influences racism and Progressivism exerted on the legal academy by this time. Several authors praised the Court for allowing

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167. Brief of Commonwealth of Kentucky at 40, Berea College v. Kentucky, 211 U.S. 45 (1908).

168. *See id.* at 41-42 (discussing rationales for separate racial education).

169. *See* Schmidt, *supra* note 139, at 452 (noting that the *Lochner/Plessy* dialectic was maintained by the narrow holding in *Berea*).

170. Berea College v. Kentucky, 211 U.S. 45, 56 (1908). Despite Berea's direct challenge, the Court did not mention *Lochner* at all.

171. *See id.* at 57 (stating that it was not unlawful to require the teaching of different races at different times).

172. *Id.* at 67-68 (Harlan, J., dissenting) (quoting Allgeyer v. Louisiana, 165 U.S. 578, 589 (1896)).

173. *See* Andrew A. Bruce, *The Berea College Decision and the Segregation of the Colored Races*, 68 CENTRAL L. J. 137, 137-38 (1909); Editorial, *The Berea College Decision*, 14 VA. L. REG. 643, 643 (1908); Note, *Constitutionality of a Statute Compelling the Color Line in Private Schools*, 22 HARV. L. REV. 217, 217 (1909).

states the authority to prohibit integration and avoid its perceived negative consequences.[174] Commentators also praised the Court for affirming that states had broad regulatory authority. *Law Notes*, for example, applauded the *Berea College* Court for reigning in "corporate aggression."[175]

Fortunately for opponents of segregation, the opinion in *Berea College* was not a complete disaster. It did not endorse the racism of the Kentucky Supreme Court's opinion or that of *Plessy*. Nor did the Court hold that under *Plessy* the Day law came within the police power. Moreover, although the opinion upheld the segregation ordinance at issue, the holding only applied to regulations aimed at corporations. The Court hinted that the segregation law would have been unconstitutional as beyond the police power had it been applied to an individual or to an unincorporated business.[176] The narrowness of the Court's holding perhaps explains why Justice Holmes, always eager to expand the scope of the police power, concurred in the judgment without opinion rather than joining Justice Brewer's opinion.[177]

Brewer's opinion, while disheartening to civil rights advocates, practically invited legal attacks on state enforcement of segregation

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174. An article in the *Central Law Journal*, for example, argued that the Day Law appropriately defended "race purity and race virility." Bruce, *supra* note 173, at 142. The author added that "the mingling of the races in the past on terms of social intimacy has invariably led te illicit intercourse and to intermarriage, and that the results have not been satisfactory to either race." *Id.* The *Virginia Law Register* hailed the opinion for destroying a "freak institution" where "negroes and whites were educatod together without distinction of race." Editorial, *supra* noto 173, at 643. A *Harvard Law Review* noto stated that given that the government clearly has the right to prohibit miscegenation, "to prohibit joint education is not much more of a step." Note, *supra* note 173, at 218.

175. Editorial, 12 LAW NOTES 163, 163 (1908). The *Virginia Law Register* applauded the decision "not so much for the set back it gives the Negrophile, but for the salutary doctrine laid down as te the right of a State to control its creation, the corporations." Editorial, *supra* note 173, at 643. According to the *Register*, the opinion ensured that "the so-called dangers of corporate aggression will be easily met." *Id.* at 644. The *Central Law Journal* contended that the statute "was essentially a police regulation, adopted for the purpose of protecting the morals and the general welfare of the people of the state," and therefore constitutional. Bruce, *supra* note 173, at 141.

A few years later, Charles Warren cited *Berea College* while defending the Court from its Progressive critics. *See* Warren, *supra* note 20, at 672 n.14. Warren pointed out that the Court upheld most of the regulations that came before it, including "negro-segregation laws," by giving wide scope to the police power. *Id.* at 695. Warren called this judicial blind eye to various economic regulations "wise policy." *Id.*; *see also* Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 451 (1926) (criticizing Harlan's attompt to expand the constitutional definition of "liberty" in his *Berea College* dissent).

176. *See Berea*, 211 U.S. at 54 ("In creating a corporation a state may withhold powers [that] cannot be denied to an individual.").

177. *See id.* at 58.

laws against private parties.[178] Such attacks soon arose against residential segregation laws.

IV. RESIDENTIAL SEGREGATION LAWS

By the 1910s, tens of thousands of African-Americans were migrating from rural areas to southern cities.[179] Many of these African-Americans took up residence in or near areas which were primarily occupied by whites.[180] Whites, meanwhile, feared their property values would decline if African-Americans moved into their neighborhoods, or worse, onto their streets.[181] In some cities, whites used violence to keep African-Americans out of their neighborhoods.[182] However, "white terrorism" could not defeat the combined purchasing power of blacks in their pursuit of housing.[183] Whites, therefore turned to the government for assistance. Politicians, in turn, recognized that residential segregation ordinances would be popular with their constituents.[184]

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178. Perhaps that was the intent of Justice Brewer, a strong proponent of laissez-faire constitutionalism. *See* David P. Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 DUKE L.J. 1111, 1136 (noting that *Berea* seemed to encourage attacks on residential segregation); *see also* 9 BICKEL & SCHMIDT, *supra* note 4, at 736 (noting that *Berea* was "upheld on the narrowest possible grounds). Justice Brewer did not participate in *Plessy*, even though he was on the Court at that time, so it is hard to gauge his views on the constitutionality of segregation.

179. *See* 2 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN PLANNING LAW § 59.03, at 736 n.8 (1987).

180. *See id.*

181. *See* OSWALD GARRISON VILLARD, SEGREGATION IN BALTIMORE AND WASHINGTON 3 (1913); *see also* Daniel T. Kelleher, *St. Louis' 1916 Residential Segregation Ordinance*, 26 THE BULLETIN—MO. HIST. SOC'Y 239, 240 (1970) ("[The segregationists'] basic appeal . . . was economic. The law would stop the real or threatened influx of Negroes who caused handsome neighborhoods to go to ruin.").

182. *See* Klarman, *supra* note 14, at 945.

183. *See* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 298 (1983).

184. Booker T. Washington, in fact, argued that the impetus for the laws came almost entirely from politicians.

> I have never yet found a case where the masses of the people of any given city were interested in the matter of segregation of white and colored people; that is, there has been no spontaneous demand for segregation ordinances. In certain cities politicians have taken the leadership in introducing such segregation ordinances into city councils, and after making an appeal to racial prejudices have succeeded in securing a backing for ordinances which would segregate the Negro people from their white fellow citizens.

Booker T. Washington, *My View of the Segregation Laws*, NEW REPUBLIC, Dec. 24, 1915, at 113; *see also* Charles E. Wynes, *The Evolution of Jim Crow Laws in Twentieth Century Virginia*, 28 PHYLON 416, 417 (1960) (finding that political considerations, rather than overwhelming racism, were behind the spread of Jim Crow laws in Virginia).

In 1910, Baltimore promulgated the first ordinance requiring African-Americans and whites to live in separate areas. According to a contemporary article by W.E.B. DuBois, successful Baltimore African-Americans had been moving out of the back alleys of the city and on to major streets.[185] When African-Americans began to buy homes on McCulloh Street, the white residents of that street "rose in indignation" and demanded that the City Council pass an ordinance prohibiting African-Americans from " 'invading' " white neighborhoods.[186] Mayor J. Barry Mahool, a leading member of the "social justice" wing of the Progressive movement, strongly supported the ordinance.[187]

In December, the City Solicitor issued an opinion that the ordinance was within the state's police power and therefore constitutional. The Solicitor relied on Progressive arguments in favor of racial zoning. He stated that

> because of irrefutable facts, well-known conditions, inherent personal characteristics and ineradicable traits of character perculiar [sic] to the races, close association on a footing of absolute equality is utterly iinpossible between them, where negroes exist in large numbers in a white coinmunity, and invariably leads to irritation, friction, disorder and strife.[188]

Segregation was constitutional because "the failure to separate the[m] injuriously affects the good order and welfare of the community."[189]

The Baltimore ordinance was imitated throughout the South. Between 1911 and 1913, Richmond, Norfolk, Ashland, Roanoke, and Portsmouth, Virginia, Winston-Salem, North Carolina, Greenville, South Carolina, and Atlanta, Georgia, all passed residential segregation ordinances.[190] These ordinances either: (1) prohibited whites from moving to all-Negro blocks and Negroes from moving to all-white blocks; (2) divided the city into segregated districts and designated a district for each race; or (3) restricted new residences in

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185. *See* W.E.B. DuBois, *Baltimore*, *in* A DOCUMENTARY HISTORY, *supra* note 5, at 23, 23-24.

186. *See id.*

187. *See* Silver, *supra* note 12, at 192 (quoting Mayor Mahool as saying "blacks should be quarantined te isolated slums . . . to prevent the spread of communicable disease into the nearby white neighborhoods").

188. Power, *supra* note 183, at 300.

189. *Id.*

190. *See* Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. SO. HIST. 179, 181 (1968).

mixed blocks to the racial group which had established most of the residences on the block.[191]

When challenged in state courts, residential segregation laws met with some initial resistance, but on very narrow grounds.[192] The laws, meanwhile, continued to spread. By 1916, Louisville, St. Louis, Oklahoma City, and New Orleans all had residential segregation laws.[193] These ordinances were extremely popular among whites; St. Louis's ordinance, for example, passed in a referendum by a margin of approximately three to one.[194]

Legal commentators were nearly unanimous in their belief that such laws were constitutional,[195] just as they had unanimously supported the constitutionality of the statute at issue in *Berea*.[196] The first and most detailed consideration of the constitutionality of residential segregation ordinances appeared in the *Columbia Law Review* in 1911.[197] The author, Warren B. Hunting, cited Gilbert

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191. *See* BERNARD H. NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920, at 23 (1946).

192. The Maryland and Georgia Supreme Courts held that specific local segregation laws were unconstitutional because they applied retroactively. *See* State v. Gurry, 88 A. 546, 552-53 (Md. 1913) (invalidating a segregation law because it could have affected the rights of current property owners to occupy their property); *see also* Carey v. City of Atlanta, 84 S.E. 456, 460 (Ga. 1915) (finding that a segregation law violated rights of current property holders to occupy their property). In *State v. Darnell*, 81 S.E. 338, 339 (N.C. 1914), the North Carolina Supreme Court held that a local segregation law was unconstitutional because it was beyond the power granted to municipalities by the state constitution. However, the North Carolina court did evince some sympathy with African-Americans in this case by noting the unfortunate history of the forced segregation of the Irish and Jews in Europe. *See id.* at 339-40.

Two other state courts held that segregation laws were constitutional as reasonable exercises of the police power because they would prevent race friction, disorder, and violence. *See* Harden v. City of Atlanta, 93 S.E. 401, 402-03 (Ga. 1917) (noting a desire to "prevent conflicts between [the races] resulting from close association"), *overruled by* Glover v. Atlanta, 96 S.E. 562 (Ga. 1918); Hopkins v. City of Richmond, 86 S.E. 139, 143 (Va. 1915) (noting the "grave danger liable to ensue from racial intermingling" (quoting opinion of the lower court)). The latter decision was "a paean to judicial restraint and progressive breadth for the police power." 9 BICKEL & SCHMIDT, *supra* note 4, at 794.

For a detailed discussion of state court opinions on residential segregation laws, see A. Leon Higginbotham, Jr., et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 807-62.

193. *See* MASSEY & DENTON, *supra* note 3, at 41.

194. *See* Kelleher, *supra* note 181, at 239. This statistic understates white support since some African-Americans voted, presumably against the ordinance.

195. Indeed, while obviously some lawyers, such as Moorfield Storey of the NAACP, believed that residential segregation laws were unconstitutional, I did not find a single article written by a legal scholar making such an argument.

196. Nor were law review authors unique. One treatise author approvingly noted in 1912 that "[t]here seems to be no limit to which a State may go in requiring the separation of the races." COLLINS, *supra* note 122, at 72.

197. *See* Warren B. Hunting, *The Constitutionality of Race Distinctions and the Baltimore Negro Segregation Ordinance*, 11 COLUM. L. REV. 24, 35 (1911) (stating that the laws seem "fair" on their "face," and "probably are so in fact").

Stephenson,[198] an expert in American race law, in distinguishing between a legal "distinction" and a "discrimination." "A race distinction connotes a difference and nothing more," Stephenson wrote.[199] Whereas "a discrimination necessarily implies partiality and favoritism."[200] According to Hunting, segregation statutes were a distinction, not a discrimination, if they restricted both races equally.[201] Because the Baltimore ordinance restricted both whites and African-Americans from moving to blocks where the other race predominated, there was no discrimination.[202] Although white blocks may be generally more desirable places to live than negro blocks, "[t]here is nothing to prevent the improvements in the negro sections from being made the finest in the city."[203]

Hunting acknowledged that exercises of the police power, including segregation laws, had to be reasonable and could not be enacted for the oppression of a particular class.[204] Hunting concluded that given the *Plessy* precedent, Baltimore's ordinance could hardly be said to be unreasonable as a matter of law.[205] Moreover, while the right to live where one wanted could be deemed fundamental, under the Baltimore ordinance "neither the whites' nor the negroes' right to live where they [wanted was] curtailed any more than [was] absolutely necessary to secure the desired separation."[206]

Other authors also rejected the idea that residential segregation laws were illicit, discriminatory class legislation. An *Ohio Law Reporter* author observed that the laws applied equally to whites and blacks. "Could anything [have been] fairer, or more impartial, in its operation than this?," he asked rhetorically.[207] An article in the *Virginia Law Review* stated that segregation ordinances were both reasonable and nondiscriminatory, because "[t]he liberty of both races were restricted to the same extent."[208] A note in the *University of*

198. *See* Gilbert T. Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 29 (1909), *quoted in* Hunting, *supra* note 197, at 28. Stephenson also authored a book with the same title that was published in 1910.

199. *Id.* at 31.

200. *Id.*

201. *See* Hunting, *supra* note 197, at 28.

202. *See id.* at 34-35 (stating that "[a] somewhat microscopic search for technical discriminations in the proposed ordinance, has, we think, failed to disclose them").

203. *Id.* at 35.

204. *See id.* at 28-29 (citing Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886)).

205. *See id.* at 29 (citing the reasonableness test developed in *Plessy*).

206. *Id.* at 32.

207. Chicago Legal News, *Separating Residences of White and Colored Races*, 11 OHIO L. REP. 353, 355 (1914). *But cf.* McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151, 161-62 (1914) ("It is the individual who is entitled to the equal protection of the laws.").

208. Recent Decisions, *Police Power—Segregation of Races*, 1 VA. L. REV. 333, 334 (1914).

Pennsylvania Law Review rejected the argument that the Louisville ordinance violated the Constitution because it restricted blacks to the less-desirable sections of the city. After all, stated the author, "they could render those portions more desirable through their own efforts as the white race has done."[209] The note criticized anti-segregation dicta in a North Carolina Supreme Court opinion invalidating a residential segregation ordinance on narrow grounds.[210] The author complained that "the court seems to have been impressed by the time-worn sophistry that, if the power exist[ed] to segregate whites and blacks, then the power must likewise exist to segregate Republican and Democrat, persons of Irish descent and those of German descent, Protestant and Catholic."[211] The author added that this argument was "conclusively disposed of" in *Plessy*.[212]

Commentators also disputed the notion that residential segregation laws unconstitutionally interfered with property rights. A *Virginia Law Register* author concluded that residential segregation ordinances were well within the police power, despite their effects on property rights.[213] An article in the *Virginia Law Review* stated that the "object of race segregation statutes is to preserve the peace and prevent conflict and ill-feeling, which experience has often shown to result from too close contact of the races."[214] The author admitted that such statutes take property without due process "to a certain extent," but "no more so than countless other police regulations."[215]

A student note in the *Michigan Law Review* examined the Maryland case that overturned a segregation ordinance because it interfered with vested rights.[216] The author noted that the court stated in dicta that residential segregation ordinances would generally be lawful, a statement that the author found to be "thoroughly sound."[217] The author added that there seemed to be a clear trend in courts favoring an increase in the scope of the police power.[218] The author wondered whether "[w]ith racial conditions in our large cities becoming more and more acute" the Maryland opinion might eventu-

209. Note, *Constitutional Law—Segregation Ordinance*, 63 U. PA. L. REV. 895, 897 (1915).
210. *See id.* at 896 (criticizing State v. Darnell, 81 S.E. 338 (N.C. 1914)).
211. *Id.*
212. *See id.*
213. *See* James F. Minor, *Constitutionality of Segregation Ordinances*, 18 VA. L. REG. 561, 574 (1912).
214. Recent Decisions, *supra* note 208, at 335.
215. *Id.*
216. *See* Note, *The Constitutionality of Segregation Ordinances*, 12 MICH. L. REV. 215, 217 (1914) (discussing the police power and racial segregation ordinances).
217. *Id.*
218. *See id.*

ally be "denounced as ultra-conservative" for putting any restrictions on segregation ordinances.[219] In other words, this student thought that forbidding a city from uprooting existing homeowners who lived on racially-mixed blocks imposed irresponsibly conservative limitations on progressive policy goals.

V. *BUCHANAN V. WARLEY*

The residential segregation case that eventually reached the Supreme Court originated in Louisville, Kentucky. Beginning in 1908, wealthy black businessmen and professionals in Louisville began to buy houses in white residential neighborhoods.[220] Apparently, this caused a great deal of alarm and consternation among whites. Many whites began to rent homes to avoid the possibility of being "trapped" next to black neighbors.[221]

Public agitation for a segregation ordinance began in November 1913. W.D. Binford of the *Louisville Courier-Journal and Times* advocated a segregation ordinance in a speech to the Louisville Real Estate Exchange.[222] He argued that such an ordinance would protect "the property owners of Louisville who have sacrificed so much in the past from the effects of the negro's presence."[223] The *Courier-Journal* was neutral on the ordinance, but the *Times* supported it. An editorial in the *Times* reported that property values in many sections of the city declined by half after blacks had moved in.[224]

Binford's speech encouraged whites who lived near black neighborhoods to lobby their councilmen for a segregation ordinance.[225] In January of 1914, a councilman introduced such a bill.[226] A group of prominent blacks, meanwhile, formed a branch of the NAACP to fight the proposed ordinance.[227]

Despite the best efforts of the NAACP, the City Council voted 21-0 in favor of the ordinance in March.[228] The ordinance then went before the Board of Alderman, which also passed the ordinance

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219. *Id.*
220. *See* George C. Wright, *The NAACP and Residential Segregation in Louisville, Kentucky, 1914-1917*, 78 REG. KY. HIST. SOC'Y 39, 41 (1980).
221. *See id.* at 42.
222. *See id.*
223. *Id.*
224. *See id.*
225. *See id.* at 43.
226. *See id.*
227. *See id.*
228. *See id.* at 44.

unanimously. On May 11, 1914, Mayor John Bushmeyer signed the ordinance into law.[229]

According to its preamble, the ordinance was passed

> to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored respectively.[230]

The body of the ordinance forbade "any colored person to move into and occupy as a residence . . . any house upon any block upon which a greater number of houses are occupied . . . by white people than are occupied . . . by colored people."[231] The opposite restriction applied to whites. Anyone violating the ordinance was subject to a fine of no less than five nor more than fifty dollars per day of violation.[232]

The national NAACP helped the local branch plan a challenge to the ordinance.[233] Backed by local real estate operators,[234] they soon organized a test case.

William Warley, an active African-American member of the Louisville NAACP, signed an agreement to purchase a lot on a majority-white block from Charles Buchanan, a white real estate agent who opposed the segregation ordinance.[235] The contract between the two parties specified that the transaction would not be consummated unless Warley had "the right under the laws of the state of Kentucky and the city of Louisville to occupy said Property as residence."[236] Warley refused to complete the transaction when he "discovered" that the Louisville segregation law would prohibit his residing in a house on the lot he was to purchase.[237] Buchanan, represented by NAACP lawyer Clayton Blakley, then sued Warley in local court.[238]

Blakley argued that the law illicitly reduced the value of a white man's property by preventing him from selling his property to blacks. The law therefore violated his client's Fourteenth

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229. *See id.*
230. *Id.* at 45.
231. *Id.*
232. *See id.* at 46.
233. Meanwhile, two blacks were arrested and found guilty of violating the ordinance for moving into houses on blocks occupied primarily by whites. *See id.* at 46-47.
234. *See* MARY WHITE OVINGTON, THE WALLS CAME TUMBLING DOWN 116 (1947).
235. *See* Wright, *supra* note 220, at 47.
236. *Id.*
237. *See* WILLIAM B. HIXSON, JR., MOORFIELD STOREY AND THE ABOLITIONIST TRADITION 139 (1972).
238. *See id.*

Amendment right not to be deprived of property without due process of law. Yet in a "burst of progressive spirit,"[239] the law was upheld throughout the Kentucky court system as a statute designed to advance civilization and promote the public welfare.[240]

The NAACP had little reason to be sanguine about its prospects before the U.S. Supreme Court. American racism was at its post-Civil War height, and the Court rarely strongly challenged prevailing social trends.[241] Moreover, *Lochner*-style traditional jurisprudence, with its sympathy for individual property rights and narrow interpretation of the police power, seemed to be on the retreat. Just three years after *Lochner*, *Muller v. Oregon* had limited *Lochner*'s scope and appeared to many to give sociological jurisprudence a toehold in the Supreme Court.[242] Even non-Progressives had adopted the expansive Progressive view of the police power, and abandoned traditional jurisprudence in favor of sociological jurisprudence.[243]

By 1916, *Lochner* seemed to represent not an era but a moment. Felix Frankfurter confidently argued that courts had perma-

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239. 9 BICKEL & SCHMIDT, *supra* note 4, at 794.

240. The Kentucky Court of Appeals wrote:

> The advance of civilization and the consequent extension of governmental activities along lines having their objective in better living conditions, saner social conditions, and a higher standard of human character has resulted in a gradual lessening of the dominion of the individual over private property and a corresponding strengthening of the regulative power of the state in respect thereof.

Harris v. City of Louisville, 177 S.W. 472, 476 (Ky. 1916). The court added that the individual's right to liberty under the Fourteenth Amendment is subordinate to the interests of the community: "[Fourteenth Amendment] guaranties are not absolute guaranties, but are subordinate to the paramount right of government to impose reasonable restraints thereupon when the public welfare renders such legislation expedient." *Id.*; *see also* Harden v. City of Atlanta, 93 S.E. 401 (Ga. 1917) (upholding racial segregation as permissible under the police power), *overruled by* Glover v. Atlanta, 96 S.E. 562 (Ga. 1918).

241. *See* Klarman, *supra* note 106, at 1930-35.

242. Muller v. Oregon, 208 U.S. 412 (1908). In upholding a maximum hours law for female laundry workers, the Court referred to and discussed the brief for the State written by Louis Brandeis. *See id.* at 419-20. Brandeis spent the vast majority of his brief discussing social science relating te women's hours of labor, rather than on legal argument. While the Court did seem to give some weight to Brandeis's work, Justice Brewer, who wrote the majority opinion, made it clear that he thought that such sociological briefs were ultimately of limited utility:

> Constitutional questions . . . are not settled by even a consensus of present public opinion, for it is the peculiar value of written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability te popular government which otherwise would be lacking.

Id. at 420.

243. Charles Warren, for example, wrote:

> The foundation of the doctrine of the State police power is that every man must hold his property and conduct his life to a certain reasonable extent in trust for the benefit of the public; and that such a trust, if reasonable, may be enforced by the legislature by appropriato legislation passed under its general police power. What is reasonable may vary at different eras and under different conditions.

Warren, *supra* note 20, at 667-68.

nently abandoned the liberty of contract doctrine in favor of a sympathetic judicial attitude toward "community interest" in property and employment regulation.[244] If so, the *Buchanan* plaintiffs were destined to lose.

A. The Plaintiff's Briefs

On appeal to the United States Supreme Court, two briefs were filed on behalf of Buchanan, the plaintiff in error. The first brief, written by NAACP president Moorfield Storey, began by arguing that the Louisville segregation statute took property without due process.[245] Storey quoted *Lochner* for the proposition that the purpose of a law must be judged by the "natural and legal effect of the language employed."[246] While the Louisville law was drafted "to preserve the semblance of equality among the races" that could not disguise the law's purpose, "which [was] to establish a Ghetto for the colored people of Louisville."[247] Storey concluded this section of his brief with an emotional appeal to the Court not to let the discriminatory attitudes of the day determine the constitutional status of African-Americans.[248]

Storey next argued that the Louisville statute was a violation of the Equal Protection Clause. He contended that

> [T]he ordinance cannot be upheld except on the *theory* that the equality required by the Fourteenth Amendment is attained by imposing a penalty upon negroes for doing something which white citizens are left free to do [i.e., purchase property on a block where most homeowners are white], provided negroes are left free to do some entirely different thing which is forbidden to white persons [i.e., purchase property on a block with mostly African-American homeowners].[249]

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244. *See* Frankfurter, *supra* note 56, at 367; *see also* Bunting v. Oregon, 243 U.S. 426, 437-39 (1917) (upholding an Oregon law imposing a maximum number of working hours per day).

245. *See* Brief for Plaintiff in Error at 12, Buchanan v. Warley, 245 U.S. 60 (1917) [hereinafter Storey Plaintiff Brief].

246. *Id.*

247. *Id.* at 14.

248. Storey wrote:

> After white and colored people have lived side by side all over the country for nearly fifty years since the Civil War, there has come an outbreak of race prejudice, and legislation like the ordinance under consideration has been attempted in various cities. It is a disease which is spreading as new political nostrums constantly spread from State to State.

Id.

249. *Id.* at 26.

Such a theory, continued Storey, could not possibly be countenanced by the Supreme Court.[250] Storey did not cite any cases to support his argument and did not cite or attempt to distinguish *Plessy*, which seemed to rely on the very theory that Storey was urging that the Court must reject.

Storey's brief also argued that segregation laws impeded the right to travel interstate, though he styled this argument as another Equal Protection claim. If the Court permitted Louisville to enforce a residential segregation law, northern cities could also enforce such laws. Unlike in Louisville, however, where blacks were well-established, blacks in northern cities represented a small proportion of the population. If northern cities passed residential segregation laws, it would be next to impossible for the growing number of black migrants to the North to find housing.[251]

Overall, Storey's brief seems to be weak and unpersuasive. Kentucky was clearly going to rely on *Plessy*, and Storey's failure to distinguish it left his clients with a serious problem that Storey did not attempt to remedy.

Clayton Blakely, who had argued for the plaintiff in the lower courts, wrote the other plaintiff's brief, which fortunately distinguished *Plessy*.[252] First, Blakely noted that the Court in *Plessy* found the statute to be constitutional because it avoided the *enforced* association of whites and African-Americans on trains. The Louisville ordinance, by contrast, affected the right of a person to live wherever he chose. Unlike the train situation, no one needed to associate with his neighbor.[253]

Second, the Court held in *Plessy* that the separate coach laws did not deprive any citizen of his property. The Louisville ordinance, however, would "deprive the plaintiff and thousands of other property owners of their property, [and] deprive the negroes of the City of Louisville of their inalienable right to acquire and enjoy property."[254] This argument ultimately prevailed before the Supreme Court.

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250. *See id.*

251. *See id.* at 28-29.

252. It is possible that the two plaintiffs' attorneys decided that Blakely, and not Storey, would deal with *Plessy*.

253. *See* Brief for Plaintiff in Error at 33, Buchanan v. Warley, 245 U.S. 60 (1917) [hereinafter Blakely Plaintiff Brief] ("If a white man did not wish to live on a block with a negro, he could move elsewhere. Not so on a train.").

254. *Id.*

B. Kentucky's Brief

Kentucky responded with an extraordinary brief, notable for its length (one hundred and twenty-one pages), its appeal to the sociological view of constitutional law, and its racism, which was particularly apparent in the introductory section of the brief. The State argued that Louisville's law *"only seeks to regulate that natural and normal segregation which has always existed and to prevent a few of each race from overstepping the racial barriers which Providence and not human law has erected."*[255] "Can it be," asked the State rhetorically, "that a negro has the constitutional right . . . to move into a block occupied by white families," even though this would lower the value of property owned by whites and create racial tension "simply to gratify his inordinate social aspirations to live with his family on a basis of social equality with white people?"[256]

The state claimed that "philosophy, experience and legal decision, to say nothing of Divine Writ" show that the races should live apart to "preserve their racial integrity."[257] According to the State, the average person finds such race-mixing "repugnant."[258] Those who do not share this prevailing view and choose to live in proximity to members of the other race threaten "the peace and good order of society."[259] The State concluded that it is neither a natural nor a constitutional right to live in "social intimacy" with members of a different race.[260]

In response to the plaintiff's argument that segregation laws would restrict African-Americans to Louisville's worst sections, Kentucky argued that "negroes carry a blight with them wherever they go . . . on what theory do they assert the privilege of spreading that blight to the white sections of the city?"[261] A few pages later, the State, with unintended irony, claimed that segregation laws "do not spring from hatred or enmity to the negro, but from a sincere desire to preserve, as far as possible, the cordial relations that should exist between the races."[262] Then, after making a gratuitous reference to

255. Brief for Defendant in Error at 10, Buchanan v. Warley, 245 U.S. 60 (1917) [hereinafter Kentucky Brief].
256. *Id.* at 11.
257. *Id.*
258. *Id.*
259. *Id.*
260. *See id.*
261. *Id.* at 13.
262. *Id.* at 18.

"negroes' limitations,"[263] the State just two pages later acknowledged that the Louisville segregation law was "an outgrowth of an instinctive race consciousness often expressing itself in the strongest social or racial antipathy between the white and negro."[264]

After concluding its discourse on race, the State turned to its legal argument. Kentucky asserted that the Court should defer to the legislature's finding that the segregation law was necessary to prevent breaches of the peace. The State added that courts had uniformly found segregation laws to be within the police power.[265] Not surprisingly, *Plessy* played a large role in this argument. The State attempted to persuade the Court that *Plessy* "simply recognize[d] those social barriers which nature itself has long ago erected between the white and colored races."[266]

After further legal argument,[267] Kentucky concluded by urging the Court to take a sociological approach to its decision. The State quoted political scientist E.R.A. Seligman for the proposition that " '[i]n the long run the economic interests of a community must prevail; for law is nothing but the crystallization of economic and social imperatives.' "[268] The state added that *Buchanan* involved "social and economic imperatives of the most solemn and impressive character" that would lead to violence and lawlessness "if they are not crystallized into law."[269]

C. The Briefs on Reargument

Buchanan was initially argued in April 1916. Justice Day missed the argument because of illness. A month later the Court ordered a reargument, so that all nine Justices could be present.[270]

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263. *Id.* at 20.
264. *Id.*
265. *See id.* at 22-32.
266. *Id.* at 38.
267. Part III of the legal section of Kentucky's brief consisted of arguments that unequal legal privileges did not violate the Fourteenth Amendment's Equal Protection and Privileges and Immunities Clauses, and that the Constitution did not attempt to guarantee social or economic equality. *See id.* at 53-80. In Part IV, the State argued that the segregation law did not violate property rights because the very purpose of the law was to preserve property values, much like other zoning laws that the Court had upheld. *See id.* at 80-108. Among other things, Kentucky cited excerpts from the record discussing declines in the value of property owned by whites when African-Americans move nearby. *See id.* at 84-85. In Part V of its brief, the State reviewed several cases in which state courts had upheld residential segregation ordinances. *See id.* at 108-18.
268. *Id.* at 118.
269. *Id.* at 119.
270. *See* C. B. BLAKELY, THE HISTORY OF THE LOUISVILLE SEGREGATION CASE 12 (1917).

1. The Storey and Blakely Brief

Storey and Blakely filed a new, joint brief for the plaintiff. They first emphasized that the ordinance would not in fact prevent whites and African-Americans from living in close proximity. For example, Storey and Blakely noted that whites were often in the majority on the front of a street, but the back alley was inhabited by African-Americans. The whites on each side of the street lived closer to the African-Americans behind them than to the whites across the street.[271]

Storey and Blakely next recounted some of the racist statements in the state's brief. They noted that these statements supported their argument that the purpose of the ordinance was to discriminate against African-Americans. Storey and Blakely mocked the notion that segregation was Divine Will: If "Providence [had] in fact erected a barrier between the races, it would be impassable and no human law would be needed" to enforce it.[272] The statute was itself evidence that its authors were not willing to trust the Providence which they invoked.

Storey and Blakely then turned to the issue of property rights and the Equal Protection Clause. They reiterated the arguments from Storey's initial brief that the Louisville ordinance violated the Fourteenth Amendment. They quoted language from *Carey v. City of Atlanta*, stating that residential segregation ordinances unconstitutionally deprived individuals of property without due process.[273] The Supreme Court ultimately adopted this position, quoting the same language from *Carey*.[274]

Although Storey and Blakely did not discuss *Plessy* in their rehearing brief, they did attempt to distinguish state cases upholding ordinances requiring railroad segregation. They argued that common law requires every common carrier to provide reasonable facilities at reasonable rates. Once the carrier did so, however, it had the perogative to determine which car each passenger could occupy. African-Americans had no right at common law to demand integrated accommodations, so they had no basis on which to challenge a segregation

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271. *See* Brief for Plaintiff in Error on Rehearing at 12-15, Buchanan v. Warley, 245 U.S. 60 (1917) [hereinafter Blakely & Storey Brief].

272. *Id.* at 22-23.

273. *See id.* at 26-27 (quoting *Carey v. City of Atlanta*, 84 S.E. 456 (Ga. 1915), a case in which the Georgia Supreme Court found that an Atlanta segregation law violated the right of current property holders to occupy their property).

274. *See* Buchanan v. Warley, 245 U.S. 60, 80 (1917).

ordinance.[275] Thus, railroad segregation ordinances were constitutional "since such a statute does not impair any right that would otherwise exist."[276] By contrast, both whites and African-Americans clearly had the common law right to alienate property.

Storey and Blakely next distinguished *Berea College* on the grounds that the Court considered the segregation law at issue to be an amendment to Berea's corporate charter. If the challenger of the law had been an individual, however, "it is plain that the statute must have been declared void . . . for the reasons cogently stated in the dissenting opinion of Mr. Justice Harlan."[277] Thus, *Berea College* was not an impediment to relief in this case.

Storey and Blakely concluded their brief by reiterating the argument that if the government could constitutionally segregate African-Americans and whites in order to separate potentially hostile groups, it would also be constitutional to segregate Irish from Jews, foreign citizens from native citizens, and Catholics from Protestants.[278]

2. Kentucky's Brief

Kentucky also filed a brief on rehearing. According to the State, the "chief purpose" of its brief on rehearing was to respond to Storey's claims during the initial oral argument that to the extent that the purpose of Louisville's segregation law was to prevent the amalgamation of the races "it is unconstitutional because such amalgamation is highly desirable, and therefore not a proper subject of police regulation."[279]

Before making its case against miscegenation, the State reiterated its arguments from its initial briefs and responded to the argument in the plaintiff's rehearing brief that the Louisville ordinance would not in fact cause the races to be separated. The State admitted that "negroes living in alleys are nearer their white neighbors than if they were living on some other block."[280] But Louisville had to "draw

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275. *See* Blakely & Storey Brief, *supra* note 271, at 38.

276. *Id.* The same argument applied to public school segregation, according to Storey and Blakely. Statutes creating segregated public schools did not reduce rights that previously existed but granted privileges which would not otherwise exist. So long as the privileges granted to each race were similar, neither had cause for complaint. *See id.*

277. *Id.* at 39.

278. *See id.* at 46-47.

279. *See* Supplemental and Reply Brief for Defendant in Error on Rehearing at 123, Buchanan v. Warley, 245 U.S. 60 (1917).

280. *Id.*

the line somewhere" and chose to segregate by street rather than engage in the more drastic measures such as "an absolutely sweeping and universal removal" of African-Americans encroaching on white neighborhoods.[281] Simply because Louisville could not fully accomplish its aim did not mean that the law was not useful and important.[282]

The State then turned to its argument that amalgamation of the races is undesirable. The State claimed that Storey was correct when he conceded that there would have to "be either social separation or else amalgamation" of the races.[283] However, the State added that to its knowledge Storey was the only white American to "advocate amalgamation [of the races] as . . . the more desirable alternative" to segregation.[284] The State argued that Storey's advocacy of race-mixing supported the State's contention that Louisville's segregation law met "a very real danger which threatened the racial integrity of the white race."[285]

The State argued that the consistent policy of the United States regarding the various races within its borders had been "[f]or races of the same color, amalgamation or fusion; for races of different color, whether Indian, Mongolian or Negro, social separateness or segregation."[286] According to the State, a legal precedent showed that the police power could be used to support a policy widely accepted by public opinion and held by prevailing morality. However, in the event the Court was too obtuse to rely on its precedents or to understand the importance of race segregation, the State provided a voluminous appendix consisting of excerpts of books and articles that supported its position.[287] The State claimed that the excerpts proved, "first, that

281. *See id.*
282. *See id.* at 129.
283. *Id.* at 142.
284. *Id.*
285. *Id.* at 143. The State contended that Storey's views should be given great weight because he was president of the NAACP. After all, argued the State, the NAACP has branches in more than 60 cities, and one can assume that Storey's views "represent the views of at least a part of that organization, if indeed they do not represent a distinct propaganda." *Id.* "We do not for a moment believe that Mr. Storey, or any member of his family, practices what he preaches to others on this subject," the State continued, "but the point we wish to emphasize is that there is always danger that others may in good faith follow the advice rather than the example of such teachers." *Id.*
286. *Id.* at 145.
287. *See* Appendix to Supplemental and Reply Brief for Defendant in Error on Rehearing at 123, Buchanan v. Warley, 245 U.S. 60 (1917) [hereinafter *Buchanan* Appendix]. Unfortunately, this appendix is not reprinted in the standard reference, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, though it is available on microfilm. Perhaps this is why it is has not been written about elsewhere.

there is a negro problem . . . further, that amalgamation offers neither a practical nor a desirable solution; and, finally, that the only other possible solution is through the various forms of segregation of the white and negro races."[288]

While each excerpt was placed under one of these three headings, the excerpts can analytically be divided into four categories: apologies for southern treatment of African-Americans, claims that an inherent racial instinct exists, opposition to miscegenation, and belief in African-American inferiority. In support of the proposition that the South treated its African-Americans kindly, or at least as kindly as could be expected, the State quoted the remarks of Charles Eliot, a leading Progressive and president of Harvard,[289] legal scholar Gilbert T. Stephenson,[290] and several other authors.[291] To demonstrate the existence of inherent racial instincts, Kentucky relied on the well-known Mississippi planter and amateur anthropologist and economist Alfred H. Stone,[292] among others.[293] Along with other opponents of miscegenation,[294] the State cited British historian James Bryce,

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288. *Buchanan* Appendix, *supra* note 287, at 145.

289. Eliot wrote that northern whites have stronger antipathies to African-Americans than do Southerners. *See id.* at 181. The only reason that segregation laws were not common in the North was because so few African-Americans settled there. *See id.*

For more on Eliot, see THE DICTIONARY OF AMERICAN BIOGRAPHY 71-78 (Allen Johnson ed., 1956), and 1 WHO'S WHO IN AMERICA: BIOGRAPHIES OF THE NON-LIVING WITH DATES OF DEATHS APPENDED 364 (5th ed. 1962).

290. In *Race Distinctions in American Law*, *see* Stephenson, *supra* note 198, at 33, Stephenson wrote that race distinctions were not confined to any one section of the country, nor were they confined to any one race. *See Buchanan* Appendix, *supra* note 287, at 174-76. He argued that race distinctions were caused by conditions and environment, rather than by the character of the people involved, thus absolving Southerners of guilt for their actions.

291. *Sec Buchanan* Appendix, *supra* note 287, at 159 (quoting William Archer for the proposition that social equality never arises when whites and blacks live together); *id.* at 165 (quoting Edgar Murphy for the propostion that African-Americans are treated better in the South than in the North); *id.* at 178 (quoting James E. Cutler); *id.* at 181 (quoting Dr. Washington Gladden for the proposition that northern labor unions exclude African-Americans); *id.* at 183 (quoting Frank U. Quillin for the proposition that the average African-American in the South is better off than the average African-American in the North).

292. Among other things, Stone wrote that "[r]acial antipathy . . . is practically universal on the part of the white race toward the Negro." *Id.* at 171; *see also id.* at 170-72 (elaborating on his racist comments).

293. *See id.* at 174 (quoting John J. Vertres for the proposition that racial prejudice is a natural sentiment which stems from the instinct of racial purity); *id.* at 180 (quoting William P. Pickett for the proposition that white hatred for African-Americans "is founded upon such fundamental, primitive instincts that its eradication is absolutely impossible").

294. *See id.* at 203-07 (quoting William Archer's impassioned and racist opposition to "racial almagamation"); *id.* at 220 (quoting John J. Vertes) ("If the civilization wrought by our race is te be preserved unharmed, neither amalgamation nor social equality should ever be permitted to exist."); *id.* at 208-09 (quoting William B. Smith's "scientific" view that physically different races produce inferior, unhealthy offspring); *id.* at 211 (quoting A. H. Shannon's claim that racial amalgamation creatos "a mongrel race whose origin is sin, and which represents the worst of all races").

author of the classic *The American Commonwealth*.[295] Finally, the State quoted a respected descendant of two presidents, Charles Francis Adams,[296] and others[297] to demonstrate African-American inferiority.

D. The Supreme Court Opinion

Justice Day ultimately wrote an opinion for a unanimous Court holding that the Louisville ordinance and, by implication, all residential segregation ordinances, were unconstitutional.[298] The opinion noted that the law did not directly implicate the right to purchase and sell property, because it regulated occupancy, not sale. Nevertheless, the Court found that the law did in practice restrict alienation because given the occupancy restrictions, in practice no African-American person would be able to purchase a house on a "white" block. Thus, the property rights of both the African-American purchaser and the white seller were at issue.

The Court then summarized three police power justifications for the law put forth by Kentucky: (1) that it promotes public peace by preventing racial conflicts; (2) that it tends to maintain racial purity; and (3) that it prevents the decline in the value of white-owned property that follows when blacks occupy adjacent premises.[299] The Court acknowledged that states have "very broad" authority to pass laws under the police power to protect public health, safety, and welfare and that property rights are subject to that police power.[300] The Court added, however, that these principles do not answer the question of whether the purchase and sale of property may be inhibited "solely because of the color of the proposed occupant."[301]

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295. Bryce wrote that interracial marriages would produce a new inferior race and that it was important to the "future of mankind" that interracial offspring not be produced. *See id.* at 199-200.

296. Adams strongly implied black inferiority by contrasting London with African cities in the course of discussing racial differences. *See id.* at 152.

297. *See id.* at 179, 214 (quoting William P. Pickett for the propositions that white and black men are opposites physically, mentally, and morally and that blacks are destined for menial labor); *id.* at 211-14 (quoting Edgar Gardner Murphy's argument that unlike the Japanese or the Russians, the "negroes do not have any cultural achievements and are truly an inferior race"); *id.* at 215 ("[T]he Negro has remained a savage."); *id.* at 229 (quoting John Temple Graves's reference to blacks as "an inferior race" who need to learn from whites from a distance (quoting John J. Vertes)).

298. *See* Buchanan v. Warley, 245 U.S. 60, 82 (1917).

299. *See id.* at 74.

300. *See id.*

301. *Id.* at 75.

The Court recounted the history of the Fourteenth Amendment and discussed the *Slaughter-House Cases* in some detail. The Court concluded that while a principal purpose of the Fourteenth Amendment was to protect African-Americans, the broad language used had been "deemed sufficient to protect all persons, white or black, against discriminatory legislation."[302] The Court stated that this was now "settled law."[303] In other words, the Court found that the Fourteenth Amendment broadly protected the public from class legislation.[304]

The Court then proceeded to tackle the most vexing issue facing it: whether its holdings in *Plessy*, and, to a lesser extent, *Berea College*, required it to uphold the Louisville ordinance. The Court was clearly not going to overrule *Plessy*, particularly since the plaintiff's briefs did not ask it to do so. Instead, the Court chose to distinguish *Plessy*.

Justice Day's opinion failed to acknowledge that the *Plessy* Court explicitly ruled that segregation laws were well within the scope the police power.[305] Nor did the Court acknowledge, much less adopt, the blatant racism underlying the *Plessy* opinion. Instead, Justice Day concluded that in *Plessy* "there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races."[306] At first blush, this statement seems to be a nonsequiter. *Buchanan* could just as easily be seen as a separate but equal case as *Plessy*. The Louisville ordinance restricted whites from occupying property on majority-African-American blocks, just as it restricted African-Americans from occupying property on majority-white blocks.[307]

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302. *Id.* at 76.

303. *Id.*

304. In fact, contrary to the analysis in *Buchanan*, the *Slaughter-House* majority rejected the theory that the Fourteenth Amendment broadly prohibited discriminatory or "class" legislation. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872). For example, with regard to the Equal Protection Clause, the Court stated: "We doubt very much whether any action of a State not directod by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Id.* at 81.

305. *See* Plessy v. Ferguson, 163 U.S. 537, 544-58 (1896); *cf.* 9 BICKEL & SCHMIDT, *supra* note 4, at 813 (noting that "[t]he opinion makes no serious effort to reconcile its holding with *Plessy* or to suggest a coherent theory of equal protection principles in relation to racial segregation").

306. *Buchanan*, 245 U.S. at 79.

307. *Cf.* 9 BICKEL & SCHMIDT, *supra* note 4, at 813 ("On its face, the Louisville ordinance no more deprived blacks of the right to own and enjoy property than separate car laws deprived them of the right to public transportation.").

Despite the artlessness of Day's prose, the Court was adopting the legally significant distinction between *Plessy* and *Buchanan* suggested by the plaintiff's reply brief.[308] According to Justice Day, in *Plessy* the Court held that African-Americans had no property or liberty right to sit where they chose in a public coach, so as long as they were provided with separate but equal accommodations.[309] The right to sit with whites would be a right to mere social equality, which the Fourteenth Amendment did not protect. However, according to Day, if African-Americans had been excluded entirely from trains or been provided with unequal accommodations, the *Plessy* Court would have found the statute unconstitutional.

Fourteenth Amendment property rights, by contrast, could not be similarly unbundled. The Court concluded that the Fourteenth Amendment protected the right to acquire, use, and dispose of real property.[310] While African-Americans did not have a common law right to sit with whites on trains, they did have a right to purchase and occupy property.[311]

The Court also distinguished *Berea College*. That case, noted the Court, dealt with the power of the state to amend or repeal its corporations' charters. The question of the scope of the police power regarding segregation "was neither discussed nor decided."[312]

To bolster its attempt to distinguish *Plessy* and *Berea College*, the Court quoted "apposite" language from *Carey v. City of Atlanta*.[313] In *Carey*, the Georgia Supreme Court stated that all that was required of Homer Plessy was "to conform to reasonable rules in regard to the separation of the races."[314] Residential segregation ordinances, by contrast, deny "the right to use, control, or dispose of . . . property."[315] *Carey* distinguished between the right of the state "to regulate a business or the like," as in *Plessy* and *Berea College*, and its

308. *See supra* notes 252-53 and accompanying text.

309. Justice Day was once again engaging in a bit of revisionist history. The Court's holding in *Plessy* did not rely upon the separate but equal doctrine. *See supra* note 139 and accompanying text.

310. *See Buchanan*, 245 U.S. at 74 ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property.").

311. The ultimate disposition of *Buchanan* shows the logic of Albion Tourgée's much-maligned strategic decision to argne in his *Plessy* brief that the Louisiana separate coach law deprived Homer Plessy of a property interest in his reputation as a white man. *See supra* notes 118-19 and accompanying text.

312. *Buchanan*, 245 U.S. at 79.

313. 84 S.E. 456 (Ga. 1916).

314. *Id.* at 459.

315. *Id.*

lack of power "to destroy the right of the individual to acquire, enjoy, and dispose of his property."[316]

Carey's distinction between the permissible regulation of businesses and of private property owners does not sound persuasive to modern ears, but as a historical matter, it had some force. Railroads, the subject of the *Plessy* case, were the most unpopular and most regulated industry in late nineteenth century America and were often treated as quasi-public utilities. To many whites of that era, it would have been considered terribly *chutzpahdik*[317] for the railroads to flaunt their disregard for (white) public opinion and permit integration. In fact, state legislatures often passed Jim Crow railroad legislation as part of a broader package of railroad regulations.[318] Moreover, during the Progressive era, when fear that corporations would destroy traditional American values was commonplace, distinguishing between individual freeholders and corporations seemed to make some sense.[319] One needs only recall, for example, that one commentator praised the *Berea College* Court for reining in "corporate aggression."[320]

Despite the *Buchanan* Court's rather Talmudic attempt to distinguish *Plessy* based on the nature of the rights involved in each case, Justice Day did not base his opinion solely on the primacy of individual property rights. As the Court acknowledged, even property rights were subject to the police power.[321] *Plessy* seemed to hold that any arguably reasonable segregation law would come within the police power. *Buchanan*, by contrast, explicitly rejected all of the police power rationales that Kentucky argued supported state-enforced segregation.

First, the Court dismissed the argument that existing "race hostility" was an appropriate rationale for narrowing the scope of citizens' constitutional rights.[322] The Court also rejected the argument that the segregation law came within the police power because it

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316. *Id.* at 460.

317. Yiddish for "extremely brazen and nervy." FRED KOGAS, A DICTIONARY OF YIDDISH SLANGS & IDIOMS 28 (1967).

318. *See* LOFGREN, *supra* note 113, at 27-29.

319. Justice Brewer, in fact, believed this distinction to be of crucial importance, which perhaps explains his opinion in *Berea College*. *See* Hylton, *supra* note 136, at 335.

320. *See supra* note 175 and accompanying text.

321. Indeed, after *Carey*, the Georgia Supreme Court held that segregation laws were constitutional as reasonable exercises of the police power because they would prevent race friction, disorder, and violence. *See* Harden v. City of Atlanta, 93 S.E. 401, 402-03 (Ga. 1917) (upholding a segregation ordinance prohibiting "colored persons" from residing in predominantly white neighborhoods), *overruled by* Glover v. Atlanta, 96 S.E. 562 (Ga. 1918).

322. *See* Buchanan v. Warley, 245 U.S. 60, 80-81 (1917).

would promote the public peace by preventing race conflict. While the Court acknowledged that this was a desirable goal, it could not be accomplished "by laws or ordinances which deny rights created or protected by the Federal Constitution."[323]

The Court found also that a segregation law could not be justified as promoting the "maintenance of the purity of the races."[324] The Court noted that the law did not directly prohibit the "amalgamation of the races."[325] The law did not even prohibit African-Americans from working in white households. Rather, the right at issue, according to the Court, was "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person."[326]

Finally, the Court spurned the claim that the law was necessary to prevent the depreciation in the value of property owned by white people when African-Americans became their neighbors.[327] The Court noted that property owned by undesirable white people or used in legal but offensive ways could similarly depreciate property. The Court implied that African-Americans had to be treated as rights-bearing individuals and not as members of a subordinate class.[328]

The Court concluded that the Louisville law "was not a legitimate exercise of the police power of the State" and directly violated the "fundamental law" of the Fourteenth Amendment "preventing state interference with property rights except by due process of law."[329]

Interestingly enough, Justice Day failed to cite *Lochner* in his opinion. Moderate traditional jurists such as Day had recently won a victory in *Bunting v. Oregon*, which upheld a maximum hours statute and seemed to repudiate *Lochner*.[330] Day apparently chose to protect that victory by ignoring *Lochner*. He did, on the other hand, cite Justice Brown's majority opinion in *Holden v. Hardy*.[331] As discussed previously, *Holden* rejected the more consistent and extreme version of laissez-faire jurisprudence advocated by Justices Brewer and

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323. *Id.*; *see* 9 BICKEL & SCHMIDT, *supra* note 4, at 814 (noting that this part of *Buchanan* was "a flat repudiation of the vague and flaccid *Plessy* standard of reasonableness as the governing constitutional sanction for legalized racism").

324. *Buchanan*, 245 U.S. at 81.

325. *Id.*

326. *Id.*

327. *See id.* at 82.

328. The Court thus picked up a theme from *McCabe v. Atchison, Topeka & Sante Fe Railway*, 235 U.S. 151, 161-66 (1914).

329. *Buchanan*, 245 U.S. at 82.

330. *See* Bunting v. Oregon, 243 U.S. 426 (1917).

331. *See* 169 U.S. 366 (1898).

Peckham, but also stated that class legislation was unconstitutional.[332] Since Brown also wrote *Plessy*, by citing *Holden*, Day was apparently making it clear that his opinion in *Buchanan* was not intended to challenge the legitimacy of *Plessy*'s holding that segregation laws do not inherently constitute class legislation.[333]

Justice Holmes drafted a dissent in *Buchanan* that he ultimately chose not to deliver.[334] Holmes was a leading light of sociological jurisprudence and had been a campaigner for a broad conception of the police power since his dissent in *Lochner*. He had also never been sympathetic to African-Americans' claims against hostile state action.[335]

Holmes had once declared that the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[336] As Kentucky's briefs pointed out, both the "prevailing morality" and the "predominant opinion," among both intellectuals and average Americans, was that forced segregation was socially beneficial and perhaps necessary.[337] Not surprisingly, Holmes's draft dissent asserted that the segregation statute did not take property without due process of law because the law was completely within the police power.[338]

The most likely reason Holmes did not deliver his dissent is that he could not get a second vote.[339] The two most promising candidates to join his dissent were Wilson appointees Louis Brandeis and James McReynolds. Brandeis was a Progressive skeptic of substantive due process and a leading advocate of sociological jurisprudence, but he was also a liberal Jew from Louisville,[340] who apparently could not countenance the establishment of de jure segregation in his home

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332. *See supra* note 62 and accompanying text.

333. *See Buchanan*, 245 U.S. at 74, 79. An opinion adopting the stronger laissez-faire view of *Lochner* would have been more of a potential challenge to *Plessy*. I thank Richard Friedman for raising this aspect of the opinion with me.

334. *See* 9 BICKEL & SCHMIDT, *supra* note 4, at 592.

335. *See* Kennedy, *supra* note 12, at 1642-44 (positing that Holmes's racial views exerted some influence on his decisions).

336. Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911) (Holmes, J.).

337. *See supra* notes 257-64 and accompanying text.

338. *See* 9 BICKEL & SCHMIDT, *supra* note 4, folio (providing a copy of Holmes's undelivered dissent in *Buchanan*). Holmes also questioned whether the Court had jurisdiction to hear the case, given that it was obviously a set-up test case, and there was really therefore no case or controversy between the putative parties. *See id.* (referring to *Buchanan* as a "manufactured case").

339. *See* 9 BICKEL & SCHMIDT, *supra* note 4, at 805 n.255.

340. *See* PHILLIPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 6-10 (1984) (discussing Brandeis's childhood, societal, and religious influences).

city, even as an experiment in one of the "laboratories of democracy."[341] McReynolds was a virulent racist,[342] but also an exponent of property rights and skeptic of government power.[343] Despite his racism, he was unlikely to join a Holmesian tribute to a broad police power.[344]

E. The Reaction to Buchanan

Civil rights advocates were overjoyed with the result in *Buchanan*. Moorfield Storey wrote to *Nation* editor and NAACP cofounder Oswald Garrison Villard that *Buchanan* was " 'the most important decision that has been made since the *Dred Scott* case, and happily this time it is the right way.' "[345] *Buchanan* also received an enthusiastic reception in the African-American media[346] and in journals sympathetic to civil rights, such as the *New Republic*[347] and the *Nation*.[348]

Law review commentators, by contrast, were generally displeased with the Court's decision in *Buchanan*. As discussed previously, pre-*Buchanan* law review commentators unanimously believed that residential segregation laws were constitutional.[349] The Court's contrary ruling in *Buchanan* did little to influence prevailing sentiment.

A note in the *Columbia Law Review* approved of the Court's ruling,[350] but all other law review commentary was hostile to the decision. For example, a student comment in the *Yale Law Journal* attacked the Court for implicitly holding that property rights were more

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341. The allusion is to *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

342. *See* Kennedy, *supra* note 12, at 1641.

343. *See* JAMES E. BOND, I DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK MCREYNOLDS 1 (1992).

344. McReynolds did not always vote with his prejudices. For example, as Barry Cushman has pointed out, despite his virulent anti-Semitism, McReynolds voted in 1939 to overturn a mail fraud conviction of several defendants with obviously Jewish surnames. *See* Weiss v. United States, 308 U.S. 321, 331 (1939); *see also* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 573 (1997) (arguing that the Four Horsemen "actually supported liberal case outcomes" despite their conservative stance in "celebrated cases").

345. HIXSON, *supra* note 237, at 142.

346. *See* 9 BICKEL & SCHMIDT, *supra* note 4, at 801-02.

347. *See* William H. Baldwin, Jr., *Unconstitutional Segregation*, NEW REPUBLIC, Jan. 19, 1918, at 345.

348. *See A Momentus Decision*, 15 THE NATION 526 (1917).

349. *See supra* notes 195-219 and accompanying text.

350. *See* Note, *Constitutionality of Race Segregation*, 18 COLUM. L. REV. 147 (1918).

important than the public's interest in segregation.[351] The student, obviously influenced by Progressivism and sociological jurisprudence, argued that "[r]ights, etc., cannot be immutable or absolute. They are creations of society, exist only where and while society exist, and change with society's changing complexion."[352] In a similar vein, a Michigan law student complained that the Supreme Court declared the Louisville ordinance to be unconstitutional despite "all this direct and emphatic expression of opinion that the ordinance was reasonably necessary and conducive to public welfare."[353]

A Harvard Law School student wrote a case note on *Buchanan* that was more sympathetic to the case's result than was the Yale writer's, but not to the Court's reasoning and especially not to its protection of property rights.[354] The author began by acknowledging that overturning a segregation law was probably a desirable political result. However, like the Yale student, the Harvard writer proceeded to criticize the Court for failing to consider the relevant social science evidence regarding the desirability of segregation. The student decried a "rule or system which permits of the entertaining and determination of legal and political questions of the most profound importance to the entire country, upon such a casual, oblique and *unscientific* presentation of the real interests involved."[355] The Court, the author reasoned, should not have rested its decision on formalistic rights-based reasoning but should have come to its decision only

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351. *See* Comment, *Unconstitutionality of Segregation Ordinances*, 27 YALE L.J. 393, 397 (1918). The student argued that:

> Where a segregation ordinance is drawn . . . and where public policy justifies its passage, analogy would seem to show that no undue strain on the police power is required to sustain such restriction of rights, privileges, and powers as is occasioned by the ordinance . . . . None the less the decision in the principal case is, unfortunately, conclusive that for the time being the interests of the public in race segregation are in law outweighed by those of landowners whose power of alienation segregation would restrict . . . .

Id.

352. *Id.* at 396 n.20.

353. Note, *Constitutionality of Segregation Ordinances*, 16 MICH. L. REV. 109, 111 (1917). The student added:

> When both the legislative and judicial departments of four states have explicitly declared it reasonable, one can not pretend that it is "arbitrary" or "palpably and unmistakably in excesss of any reasonable exercise of authority," or even that it is "clearly" unreasonable. In declaring the ordinance void without such obvious unreasonableness, the court has exceeded the limits of its privilege as fixed by judicial declaration ever since the right of review has been exercised.

Id.

354. *See* Note, *Race Segregation Ordinance Invalid*, 31 HARV. L. REV. 475, 476 (1917) (referring to the decision as the "desirable result" but one not reached by "sound canons of judicial review").

355. *Id.* at 477 (emphasis added).

"after careful consideration of the *facts*, as to the effect of propinquity and intermingling of the races."[356]

Ten years after the Court decided *Buchanan*, at least one law review author still could not accept the Court's disregard for what appeared to him to be the obvious public interest in residential segregation:

> Commingling of the homes and places of abode of white men and black men gives unnecessary provocation for miscegenation, race riots, lynchings, and other forms of social malaise, existent when a child-like, undisciplined, inferior race is living in close contact with a people of more mature civilization.[357]

Several years later, an article in the *Michigan Law Review* criticized *Buchanan* because "there should have been some conscious appraisal of the social desirability of segregation by legal device."[358] Given the consensus in the law reviews that residential segregation ordinances were constitutional, the rise of sociological jurisprudence, and the racial climate of the time, one can dismiss the views of those who argue that *Buchanan* was a pedestrian decision, involving a law so blatantly unconstitutional that the result was almost inevitable.[359]

VI. THE PRACTICAL SIGNIFICANCE OF *BUCHANAN*

While *Buchanan* represented a great moral victory for African-Americans, the practical effect of the decision on the rights of African-Americans has never been fully explored. It is well known that *Buchanan* caused the end of explicit de jure residential segregation[360]

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356. *Id.* at 479.

357. George D. Hott, *Constitutionality of Municipal Zoning and Segregation Ordinances*, 33 W. VA. L.Q. 332, 348-49 (1927).

358. Arthur T. Martin, *Segregation of Residences by Negroes*, 32 MICH. L. REV. 721, 731 (1934).

359. *See* 9 BICKEL & SCHMIDT, *supra* note 4, at 744 (explaining that this is one way te look at the case); DONALD W. JACKSON, EVEN THE CHILDREN OF STRANGERS: EQUALITY UNDER THE U.S. CONSTITUTION 74 (1992) (describing the decision in *Buchanan* as the result of a law "so blatantly discriminatory and so clearly antithetical to the purposes of the Fourteenth Amendment that sometimes even the most reluctant Justices . . . could see the contradictions"); Klarman, *supra* note 14, at 898 (arguing that, along with other cases of the era, the racial practices at issue in *Buchanan* "were so obviously unconstitutional" that "even a Court relatively unsympathetic toward racial equality might feel bound to invalidate them").

360. Relying on *Buchanan*, the NAACP persuaded the Supreme Court to invalidate segregation ordinances in New Orleans, *see* Harmon v. Tyler, 273 U.S 668 (1927), and Richmond, *see* City of Richmond v. Deans, 281 U.S. 704 (1930). Local branches of the NAACP successfully challenged laws passed in Indianapolis, Norfolk, and Dallas. *See* VOSE, *supra* note 6, at 51-52 (discussing various successful challenges of segregation ordinances brought by the NAACP). By the 1930s, laws mandating residential segregation were rare. *See id.* at 52.

but had little effect on housing segregation. After *Buchanan*, most whites continued to flee from their neighborhoods when a significant number of African-Americans moved in. *Buchanan* did not and could not affect the strong preference for segregation among whites.[361]

Nevertheless, *Buchanan* was an important decision. First, *Buchanan* limited the ability of whites to prevent African-Americans from moving into white neighborhoods, and discouraged whites from denying public services to African-American neighborhoods. Second, though it was not used to its full potential, *Buchanan* almost certainly prevented governments from passing far harsher segregation laws than *Buchanan* itself involved. *Buchanan* also prevented residential segregation laws from being the leading edge of broader anti-negro measures. Finally, the NAACP's victory in *Buchanan* helped assure the future of that crucial organization, and also represented an extremely positive turning point in the Supreme Court's reaction to discriminatory legislation.

A. Effects on Housing Opportunities for African-Americans

The fact that *Buchanan* did not affect housing segregation does not mean that the opinion lacked economic significance. Rather, the opinion forced racist whites to pay some of the costs of their discriminatory attitudes rather than imposing them on African-Americans and helped assure that African-American urban neighborhoods received appropriate public services.

During the 1910s, substantial numbers of southern African-Americans moved from rural areas to cities. As the African-American population of cities increased, African-American migrants moved into older white neighborhoods.[362] When whites panicked at the prospect of having African-American neighbors and sold to incoming African-Americans at fire-sale rates, African-Americans benefited from white

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Despite the general demise of residential segregation ordinances, a state court invalidated a Winston-Salem ordinance as late as 1940. *See* Gardner Major, *Race Segregation in Cities*, 29 KY. L.J. 213, 213 (1941). Oklahoma City passed a residential segregation law in 1935. This law survived a court challenge because the complaint was flawed. *See* Jones v. Oklahoma City, 78 F.2d 860, 861 (10th Cir. 1935).

361. Nor could any other court policy reasonably attainable in the 1910s, such as a ban on the enforcement of restrictive covenants. Even future Nobel Prize winning economist Gunnar Myrdal did not understand this dynamic. Myrdal incorrectly believed that if the Supreme Court declared restrictive covenants illegal, "segregation in the North would be nearly doomed, and segregation in the South would be set back slightly." GUNNAR MYRDAL, AN AMERICAN DILEMMA 624 (1944).

362. *See* William A. Fischel, *Why Judicial Reversal of Apartheid Made a Difference*, 51 VAND. L. REV. 977, 981-84 (1998).

racism by acquiring inexpensive property. Whites, by contrast, payed for their discriminatory attitudes in lost property values.[363] Thus, a primary motive behind residential segregation laws was to prevent African-Americans from buying into white neighborhoods at low prices.[364]

While the absence of artificial barriers to African-American housing compelled whites to pay the price for their racism, segregation laws raised the price of housing for African-Americans above normal market levels. When African-Americans could not move into older white neighborhoods, the supply of housing for African-Americans was restricted, at the same time demand was increasing with the arrival of migrants. The combination of restricted supply and increased demand forced African-Americans to pay above-market rates for housing, at least in the short term.[365] In other words, segregation laws shifted the economic cost of white racism from whites to African-Americans.

Moreover, the presence of segregation laws allowed politicians to discriminate in the provision of public services with impunity. African-American areas were typically denied sewers, parks, road paving, and other public services routinely provided to white areas.[366] In the absence of segregation laws, however, if African-American neighborhoods were continually denied necessary public investments, their residents would be inclined to try to move to white neighborhoods. But for segregation laws, therefore, self-interested whites concerned about their property values would be inclined to support

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363. In fact, one of the plaintiff's briefs in *Buchanan* made this argument, albeit obliquely:

> As a rule the negro does not move into a neighborhood where only white people reside. He establishes his residence on a block where one or more negroes live, and in this way the less desirable white blocks gradually become occupied by negroes. For a certain period the property in such a block becomes less valuable, but when entirely converted into a negro block it becomes more valuable than before.

Storey Plaintiff Brief, *supra* note 245, at 41.

364. *See* Wright, *supra* note 220, at 42. W.D. Binford, the leading proponent of the Louisville segregation law, claimed that some African-Americans even moved into white neighborhoods to extort money from their neighbors to leave. *See id.* at 42. Kentucky's initial *Buchanan* Supreme Court brief discussed in some detail the bargains that Louisville African-Americans received because of white prejudice. Several white residents and real estate experts had testified in the trial court that whites had sold their homes for about half their prior market value after African-Americans moved into the neighborhood. *See* Kentucky Brief, *supra* note 255, at 85-90.

365. In the longer run, real estate developers would probably create new housing for African-Americans, helping to stabilize prices.

366. *See* William Pickens, *The Ultimate Effects of Discrimination and Segregation*, in A DOCUMENTARY HISTORY, *supra* note 5, at 78, 81.

more equitable public spending for African-American neighborhoods.[367]

With all this in mind, one should not judge the success of *Buchanan* in aiding African-Americans solely by whether segregation decreased, but also by whether white neighborhoods were opened up to African-American residency, even if the neighborhoods went from all-white to all-black. By this standard, *Buchanan* was a qualified success, as it immediately opened certain white neighborhoods to African-Americans in Louisville, Richmond, and other cities where African-Americans had been shut out by segregation laws.[368] The *Virginia Municipal Review* complained that because Richmond could not regulate its housing market, there was "a gradual and natural encroachment of the colored population into white neighborhoods."[369] Richmond, according to the *Review*, was "face to face with a problem of increasing significance whose solution deserves the thought and discussion of leaders of both races."[370] The author of a study of African-American housing in urban Virginia lamented the inability of state and local governments to use zoning to separate black and white residential areas.[371] He stated that this led to an increase in "friction between the white race and the black" and exacerbated the deplorable housing conditions in certain areas.[372]

While *Buchanan* opened up white neighborhoods to African-Americans in the short run, the longer term effects of the ruling are less clear. Whites eventually learned to use barriers other than explicit racial zoning to keep African-Americans out of their neighborhoods. Two of the most prominent tactics were facially-neutral zoning laws and restrictive covenants.

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367. A more subtle factor was also at play. If certain areas could be designated as "whites-only" by law, whites could be assured that any public investments in those areas would accrue only to them and not to African-Americans. If African-Americans could move into white neighborhoods, however, the investments made in those neighborhoods when whites inhabited them might eventually benefit African-Americans, lessening the incentive to discriminate in the provision of public services. *Cf. id.*

368. *See* Wright, *supra* note 220, at 52.

369. VA. MUN. REV., Nov. 1925, at 253.

370. *Id.* Ultimately, Richmond attempted to solve this "problem" by enacting a new residential segregation ordinance it hoped would pass constitutional muster. It did not. *See* City of Richmond v. Deans, 281 U.S. 704 (1930) (affirming the Fourth Circuit's finding that Richmond's racial segregation ordinance violated the Fourteenth Amendment).

371. *See* CHARLES L. KNIGHT, NEGRO HOUSING IN CERTAIN VIRGINIA CITIES 49 (1927).

372. *See id.* at 50. Knight concluded that "[t]he only feasible solution to this problem is to provide new residential areas for Negroes in suitable locations." *Id.*

1. Facially-Neutral Zoning Laws

Municipal authorities, especially in the South, turned to facially-neutral zoning laws to restrict African-American residence.[373] Racial zoning continued to operate in practice and "was reinforced by a planning process that accepted the primacy of establishing a racially-bifurcated society."[374]

Progressive city planners were particularly ardent proponents of racial zoning.[375] For example, Robert Whitten, one of the leading city planners of his day, designed a 1922 Atlanta scheme that designated the unofficial white districts R1, the unofficial black districts R2, and the unofficial mixed districts R3.[376] In defense of his plan, Whitten stated that "race zoning is essential in the interest of the public peace, order and security and will promote the welfare and prosperity of both the white and colored race."[377] The state supreme court, however, declared the Atlanta scheme unconstitutional.[378]

Despite this decision, racial zoning "still prevailed, either in other attempts to pass laws or, more often, in the sense that city officials remained cognizant of what sections had been designated as appropriate for black use."[379] In many cities, the awareness of racial boundaries informed road placement, as planners attempted to cut off African-American areas from white areas.[380]

Birmingham and Charleston are just two examples of cities that unofficially zoned by race after *Buchanan*. In 1926, Birmingham passed a zoning ordinance which reinforced segregated residential patterns,[381] and racial zones dictated Birmingham's residential development patterns from 1926 to 1949.[382] Birmingham actually bought and demolished several black-owned houses to create a buffer zone

373. *See* MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION 13-14 (1976); Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627, 636 (1988); Silver, *supra* note 12, at 196; Norman Williams, Jr., *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317, 336 (1955).

374. Silver, *supra* note 12, at 196.

375. *See id.*

376. *See* ATLANTA CITY PLANNING COMMISSION, THE ATLANTA ZONE PLAN: REPORT OUTLINING A TENTATIVE ZONE PLAN FOR ATLANTA 10 (1922).

377. *Id.*

378. *See* Smith v. City of Atlanta, 132 S.E. 66, 70 (Ga. 1926).

379. Ronald H. Bayor, *Roads to Racial Segregation*, J. URBAN HIST. 3, 5 (1988).

380. *See id.*

381. *See* Harris, *supra* note 2, at 571 n.10.

382. *See* Silver, *supra* note 12, at 197.

between the white and black sections.[383] Implicit racial zoning, meanwhile, was "integral" to Charleston's comprehensive city plan.[384]

Discriminatory zoning practices spread to the North as well. Municipalities commonly engaged in the tactic of passing very strict, expensive zoning laws, but only enforcing them against blacks, while giving whites variances.[385] Another tactic was to zone for industrial use only land that African-Americans seemed likely to use for residences. One town in Michigan prohibited building on parcels of less than twenty acres after African-Americans bought land there.[386] Such uses of zoning laws were not seriously challenged until well into the modern civil rights era. Charles Abrams found in 1955 that "[a]s long as the officials do not openly give the reason for their [discriminatory] action, recourse to the courts is often futile."[387]

Initially, some courts invalidated residential zoning on constitutional grounds. In *Ambler Realty Co. v. Village of Euclid*, a federal district court relied on *Buchanan* in declaring residential zoning to be unconstitutional.[388] The court noted that while Kentucky defended the *Buchanan* ordinance as necessary for the preservation of the public peace and the protection of local property values, no such crucial interests were asserted in *Euclid*.[389] The result of *Buchanan* therefore, according to the court, mandated that the *Euclid* ordinance be invalidated.[390]

The court added that the result of the *Buchanan* case prevented racial zoning from spreading "from city to city throughout the breadth of the land."[391] The court prophetically predicted that if courts upheld residential zoning, municipalities would eventually "classify the population and segregate them according to their income or situation in life."[392]

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383. *See id.*

384. *See id.* at 198.

385. *See* CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 210 (1955).

386. *See id.* at 211.

387. *Id.* at 210.

388. *See* 297 F. 307, 312-13 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

389. *See id.*

390. *See id.*; *cf.* Comment, *supra* note 351, at 396 (arguing that the Court's reasoning in *Buchanan* would necessarily lead it to question zoning more generally).

391. *Euclid*, 297 F. at 313.

392. *Id.* at 316; *cf.* Spann v. City of Dallas, 235 S.W. 513, 516 (Tex. 1921) (expressing the fear that if residential zoning triumphed, a poor man who owned a lot in a wealthy neighborhood would be told "that he could not erect an humble home upon it suited to his means").

Leading planner Robert Whitten admitted that "zoning tended inevitably toward the segregation of the different economic classes," but he argued that this was a *favorable* effect of

None of this persuaded the Supreme Court. The Court reversed the district court in a 6-3 opinion written by Justice Sutherland.[393] Sutherland wrote that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[394] Once the Supreme Court gave this green light to residential zoning, zoning was easily used for nefarious purposes, including implicit racial zoning.[395] How much effect implicit racial zoning had on African-American residential patterns is a subject that deserves further study.

2. Restrictive Covenants

Another important mechanism whites used to impede African-Americans from buying property in white neighborhoods was the racially restrictive covenant. In 1926, the Supreme Court, in dicta, unanimously stated that judicial enforcement of restrictive covenants did not violate the Equal Protection Clause.[396] This opinion has been widely and unfairly[397] criticized and has received far more attention

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zoning. Robert H. Whitten, *Zoning and Living Conditions*, *in* NATIONAL CONFERENCE ON CITY PLANNING, PROCEEDINGS OF THE NATIONAL CONFERENCE ON CITY PLANNING 22, 27 (1924).

393. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 379-87 (1926).

394. *Id.* at 388.

395. Several commentators noted the inconsistency between *Euclid* and *Buchanan* and hoped that the logic of the Court's decision in *Euclid* would eventually lead to a reversal of *Buchanan*. *See* Hott, *supra* note 357, at 349 ("If a municipality can prevent the establishment of a 'Piggly-Wiggly' store in a residential section, without violating any of the constitutional prohibitions, it should follow that an ordinance, excluding negroes from a 'white' zone and vice versa, should, in the absence of infringement of existing property rights, be constitutional."); F.D.G. Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, 16 VA. L. REV. 689, 699 (1930) (noting the inconsistency between the result of *Buchanan* and the results of other zoning cases); Note, *Race Segregation in Cities*, 29 KY. L.J. 213, 218-19 (1941) (arguing that segregation ordinances should be upheld just like other zoning ordinances that serve the public good).

396. *See* Corrigan v. Buckley, 271 U.S. 323, 330-31 (1926) (stating that the Fourteenth Amendment did not "in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property").

397. The appellant in *Corrigan* argued that judicial enforcement of a restrictive covenant was state action that violated the Equal Protection Clause. *See id.* at 328-29. The Court, in dicta, rejected this argument. *See id.* at 330. But even if judicial enforcement of a restrictive covenant were state action, it is not at all clear why this would violate the Equal Protection Clause, so long as the restrictive covenants were enforceable against any group, and so long as the judiciary did not selectively enforce them.

In my view, the Supreme Court could have properly invalidated racially restrictive covenants on the ground that courts clearly treated restrictive covenants far more leniently then other restraints on alienation. The Louisiana Supreme Court, for example, upheld a racial restrictive covenant on the grounds that partial restraints on alienation are valid. *See* Queensborough Land Co. v. Cazeaux, 67 So. 641, 643 (La. 1915), *overruled by* Johnson v. Campagna, 200 So. 2d 150 (La. Ct. App. 1967). The court failed, however, to mention that the population of the county in which the property was located was 45% African-American, making the restrictive covenant a severe restriction on alienation. *See* Martin, *supra* noto 358, at 736.

among legal scholars than has zoning as a cause of restrictions on housing for African-Americans.[398]

Despite the disproportionate attention paid to restrictive covenants relative to zoning laws, the comparative effectiveness of restrictive covenants is open to debate. First, courts in several states refused to enforce racial restrictive covenants because they were unreasonable restraints on alienation.[399] Second, restrictive covenants needed to cover just about every property in a neighborhood to be effective. While real estate developers were able to write restrictive covenants into the deeds of houses in new developments, in existing neighborhoods local activists had to persuade the existing resi-

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Generally, the greater the restraint on alienation, i.e., the greater the percentage of African-Americans in the local population, the *less* willing courts were to void restrictive covenants as restraints on alienation. *Compare* Los Angeles Inv. Co. v. Gary, 186 P. 596, 597 (Cal. 1919) (refusing, in a jurisidiction with a relatively small black population, to enforce a restrictive covenant because the covenants were restraints on alienation); Title Guarantee & Trust Co. v. Garrott, 183 P. 470, 473-75 (Cal. Ct. App. 1929) (same); Porter v. Barrett, 206 N.W. 532, 536 (Mich. 1925) (same); Williams v. Commercial Land Co., 34 Ohio L. Rep. 559, 561-63 (1931) (same); White v. White, 150 S.E. 531, 532-39 (W. Va. 1929) (same), *with* Cornish v. O'Donoghue, 30 F.2d 983, 984 (App. D.C. 1929) (same); *Queensborough Land Co.*, 67 So. at 643 (same); Torrey v. Wolfes, 6 F.2d 702, (App. D.C. 1925) (enforcing, in a jurisdiction with a relatively large minority population, restrictive covenants). *But see* Koehler v. Rowland, 205 S.W. 217, 220-22 (Mo. 1918) (refusing, in a state with a relatively small black population, to enforce restrictive covenants). *See generally* Martin, *supra* note 358, at 738-39 (discussing the significance of the size of the excluded group upon the assessment of the degree of restraint caused by provisions restricting alienation). The argnment presented here does not seem te have been made to the Supreme Court.

398. *See, e.g.*, 9 BICKEL & SCHMIDT, *supra* note 4, at 817; A. LEON HIGGINBOTHAM, SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 125 (1996) ("One could argue that the *Buchanan* case was of minimal importance because white owners were still able to implement racist policies through restrictive covenants and other private devices that precluded African Americans from moving into 'their areas.' "); RICHARD KLUGER, SIMPLE JUSTICE 149 (1975) ("Voters who had been barred by the Court from passing laws to ghettoize Negroes could acbieve tbe same effect by drawing up private agreements with the assurance that these would be upbeld and enforced by the law of the land."); MASSEY & DENTON, *supra* note 3, at 188 (argning that restrictive covenants replaced explicit racial zoning as a means of segregation); DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO PRESENT 129 (1991) ("[T]he victory [in *Buchanan*] was pyrrhic. *Buchanan* broke the back of efforts to legislate residential segregation, but it said nothing about the use of restrictive covenants, whicb were becoming an increasingly popular ineans of inaintaining segregated housing, especially in Northern cities."); JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 348 (1978) ("Unfortunately, [*Buchanan*] did not appreciably diminish segregated neighborhoods; the private restrictive covenant that was made part of the deed would fill in the gap left by the decision and survive for another generation."); WILLIAM FINDLEY SWINDLER, COURT & CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932, at 293 (1969) (blaming restrictive covenants for creating segregation).

It is interesting to note that Swindler's book, which blames laissez-faire ideology for virtually every societal ill, never mentions *Buchanan*, even in an appendix summarizing important cases from 1889-1932 in chronological order.

399. *See, e.g.*, *Los Angeles Inv. Co.*, 186 P. at 597-98; *Garrott*, 183 P. at 471-75; *Porter*, 206 N.W. at 533-36; *Williams*, 34 Ohio L. Rep. at 561-63; *White*, 150 S.E. at 538.

dents to sign such covenants. Because a certain percentage of residents of any given neighborhood at any given time planned to move in the near future, and assumedly wanted as large a potential market for their residence as possible, this could not have been an easy task.

Once a neighborhood was covered by restrictive covenants, moreover, they were not self-enforcing. Rather, if an African-American tried to move into a neighborhood, local residents needed to hire an attorney to enforce the covenant, presenting a severe collective action problem.[400] By the time residents could organize a lawsuit, changed conditions may have rendered the covenant unenforceable.[401] Moreover, real estate agents sometimes aided white sellers in finding African-American buyers willing to buy a property subject to a restrictive covenant.[402] Restrictive covenants certainly played some role in keeping African-Americans out of white neighborhoods, but perhaps not as large a role as is commonly assumed. Surely, the Supreme Court's decision in *Shelley v. Kraemer* barring judicial enforcement of racial restrictive covenants did not create an open housing market for African-Americans.[403]

Indeed, even if zoning and restrictive covenants had been outlawed by the courts, the housing market would still not have been completely open to African-Americans. Two of the most important factors in closing residential housing markets to African-Americans, local violence and discriminatory federal housing policies, were essentially beyond the reach of federal courts until the 1960s.[404]

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400. *See* VOSE, *supra* note 6, at 56-59. In an effort to overcome the collective action problem, Dallas, Texas, passed an ordinance making the violation of a restrictive covenant agreement a crime. A state court of appeals held that the ordinance was unconstitutional. *See* City of Dallas v. Liberty Annex Corp., 19 S.W.2d 845 (Tex. Civ. App. 1929).

401. *See* VOSE, *supra* note 6, at 25 ("[W]here Negroes were free to purchase and occupy homes in a restricted district and did so in such large numbers that the party seeking enforcement of the covenant was already living under the very conditions it was designed to prevent, no remedy was granted.").

402. *See* KNIGHT, *supra* note 371, at 36.

403. 334 U.S. 1, 20 (1948) (holding that granting judicial enforcement of restrictive covenants based on race violated the Equal Protection Clause); *see also* BELL, *supra* note 93, at 477 (describing how segregationist whites took advantage of the *Shelley* decisions to exclude blacks); VOSE, *supra* note 6, at ix (1959) (describing the limited success of the NAACP in eliminating the judicial enforcement of racially restrictive covenants in residential neighborhoods); Joe T. Darden, *Black Residential Segregation Since the 1948* Shelley v. Kraemer *Decision*, J. BLACK STUD. 680, 688 (1995) (discussing the limited progress made by African-Americans in reducing segregation in housing since the *Shelley* decision).

404. *See* KING, *supra* note 13, at 189-99 (discussing the impact of federal housing policies); Klarman, *supra* note 14, at 945 (discussing the impact of violence).

B. Effects on Other Segregation Laws

Several common segregation laws described by C. Vann Woodward in *The Strange Career of Jim Crow*—such as laws requiring nurses to attend to patients of their own race only, laws requiring fraternal societies to be segregated, and even laws prohibiting integration in unincorporated private schools—seem to have been constitutionally vulnerable after *Buchanan*.[405] Surprisingly, however, *Buchanan* was not used to invalidate segregation laws outside the residential housing context.

1. The Failure to Use *Buchanan* to Invalidate Segregation

One reason that *Buchanan* was not used outside of the residential housing context was the narrowness of its holding. Mere de jure segregation that did not amount to "discrimination" and that did not impinge on other constitutional rights continued to be licit under *Plessy*, and any segregation ordinance that restricted corporations' activities apparently passed constitutional muster under *Buchanan*.

On the other hand, *Buchanan* seemed to deny that there were any valid police power justifications for segregation laws, so that any segregation law that impinged on the Fourteenth Amendment rights of individuals was unconstitutional. One wonders, for example, what would have been the outcome of a post-*Buchanan* lawsuit by a white person who claimed that a Jim Crow railroad law of the *Plessy* type violated his associational rights under the Fourteenth Amendment because he wanted to associate with African-Americans on trains.[406]

The problem with testing the scope of *Buchanan* was that the NAACP, the ouly active national organization fighting to expand the constitutional rights of African-Americans, had extremely limited resources.[407] Organizing challenges to discriminatory statutes required money and willing plaintiffs, both of which were in short supply.

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405. *See* WOODWARD, *supra* note 7, at 97-102.

406. This is a particularly interesting question because in the 1920s the Supreme Court implicitly recognized a constitutional right to freedom of association in at least some contexts, a right perhaps not recognized when the Court decided *Plessy*. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (McReynolds, J.) (invalidating a law banning children from attending private schools); Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923) (McReynolds, J.) (holding unconstitutional a law banning the toaching of foreign languages in school). One also wonders what the result of a challenge to the Day Law would have been under *Pierce* if a white student had argued that he had the right to associate with African-American students for educational purposes.

407. *See* VOSE, *supra* note 6, at 51-52.

Money was a particular problem for the NAACP in its early years. The NAACP might not have had the resources to challenge *Buchanan* if its attorney, Moorfield Storey, had not offered his services for free.[408] Even after the favorable *Buchanan* decision, the NAACP had to expend substantial resources to defeat the residential segregation ordinances that cities continued to enact despite *Buchanan*. Forced to combat opponents who had tax money at their disposal, the NAACP had little money left to finance challenges to segregation ordinances outside the residential context.[409]

Finding willing plaintiffs was also a challenge. Not long before *Buchanan* was decided, Booker T. Washington organized a challenge to a Tennessee Pullman car segregation law. One might assume this challenge would have been fought on *Buchanan*-like due process grounds, as *Plessy* already established the constitutionality of such laws under the Equal Protection Clause. The prospective plaintiff lost his nerve, however, and the case never made it to trial.[410]

Other obstacles stood in the way of using *Buchanan* to full effect. Few white Southern lawyers were willing to take cases on behalf of African-Americans,[411] few of those were trained to do so, and there were even fewer black lawyers in the South competent to handle civil rights cases.[412] Even those white lawyers who were sympathetic to civil rights would not, for both social and professional reasons, wage a consistent battle for the protection of the rights of African-Americans.[413] It was not nntil the early 1920s that the civil rights movement began to train a coterie of competent full-time civil rights attorneys. By the time they were established in the 1930s, the heyday of laissez-faire jurisprudence had ended, and challenges based on equal protection grounds seemed more propitious for the future than substantive due process challenges based on *Buchanan*.[414]

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408. *See id.*

409. *See id.* at 52.

410. *See* LOUIS R. HARLAN, BOOKER T. WASHINGTON: THE WIZARD OF TUSKEGEE 1901-1915, at 248 (1983).

411. *See id.* at 247.

412. *See* NELSON, *supra* note 191, at 163.

413. *See id.* at 162-63.

414. There may also have been psychological and political barriers to using *Buchanan* to its full effect. Most NAACP activists were politically left-wing. At W.E.B. DuBois's insistence, every issue of the NAACP's magazine, *The Crisis*, had the printers' union's label displayed upon its cover, despite the fact that the printers' union did not accept black members. *See* 15 THE CRISIS 216 (1918). By 1935, the NAACP had moved so far left that it refused to criticize New Deal policies that granted monopoly power to racist unions for fear of hurting the labor movement. *See* RAYMOND WOLTERS, NEGROES AND THE GREAT DEPRESSION 306-09 (1970). Surely, it would have been quite ideologically uncomfortable for such people to attempt to use the

Given all these obstacles, the NAACP had the choice of expending a substantial percentage of its limited financial resources on fighting certain types of segregation, with the most important type, public school segregation, almost certainly off-limits as a practical matter;[415] or on other priorities, such as its push for federal anti-lynching legislation and for equal resources for African-American public schools.[416] If *Buchanan* had come out the other way, the NAACP may have had no choice but to fight a rearguard action against new segregation legislation. But *Buchanan* set a constitutional outer limit on segregation legislation, which allowed the NAACP to concentrate on its other priorities.

2. The Road Not Taken

While *Buchanan* could not be used to roll back such established forms of segregation as separate public schools, it also represented a firm warning to the nation that the Supreme Court would not allow the spread of segregation laws into new areas of civil society. An amicus brief in *Buchanan*, filed by attorneys challenging St. Louis's residential segregation ordinances, presented a chilling prediction of what would have happened if the Court upheld Louisville's segregation ordinance:

> [D]iscriminating legislation, once countenanced, may go to the exclusion of the negro altogether. The prejudice of race grows by what it feeds upon. Its appetite is insatiable. "The disposition of the whites to retire from the vicinity of negro residences" will change to a determination to force the negro from the vicinity of white residence, for the white man will make the law and the negro must bear the hardships they impose.
>
> One entered upon segregation will not be simply local, but it will be industrial as well. The colored man will be restricted in the field of his labor as well as in the field of his residence. Property values may not be so much imperilled here, but the integrity of race is as much threatened. If they may not live in the same block, they should not toil at the same tasks. The logical outcome of it all, would be the existence among us of millions of people, in a

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Lochnerian arguments adopted in *Buchanan* to fight further segregation laws when success would encourage legal attacks on other types of Progressive legislation.

415. This was confirmed by the Supreme Court's opinion in *Gong Lum v. Rice*, 275 U.S. 78, 85-87 (1927) (finding that a United States citizen of Chinese ancestry was not denied equal protection when assigned to a segregated public school).

416. *See generally* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950, at 77-78 (1980) (discussing the development of the NAACP's anti-lynching committee).

> degraded and hateful relation, a condition which can be productive only of evil to both races.[417]

The brief's vision of forced uprooting of African-Americans who live near whites, and of de jure occupational segregation, seems perhaps unduly alarmist. But then one remembers the alarmism of Justice Harlan's dissent in *Plessy*. In his dissent, Justice Harlan suggested various segregation laws that would logically henceforth pass constitutional muster:

> Why may [a state] not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the considerations of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?[418]

Harlan clearly believed he was exaggerating for effect, and noted that the likely response to his question would be that such regulations "would be unreasonable, and could not, therefore, stand before the law."[419] Yet, in fact, of the parade of horribles listed by Harlan, segregation of streetcars, courthouses, and public seating in legislative assemblies all became common throughout the South. After *Plessy*, what was once almost unimaginable became routine. Once the Supreme Court accepted a certain type of segregation ordinance in *Plessy*, broader restrictive laws followed. If the Supreme Court had acquiesced to residential segregation laws, the same pattern would likely have occurred.[420] This almost certainly explains why, twenty years after *Buchanan*, with de jure segregation entrenched in public education, transportation, and elsewhere, W.E.B. Du Bois credited *Buchanan* with " 'the breaking of the backbone of segregation.' "[421] Indeed, *Buchanan* may have saved the

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417. Brief of Wells H. Blodgett & Frederick W. Lehmann as Amici Curiae at 8-9, Buchanan v. Warley, 245 U.S. 60 (1917).

418. Plessy v. Ferguson, 163 U.S. 537, 538 (1896) (Harlan, J., dissenting).

419. *Id.*

420. On the other hand, it is possible that World War I, urbanization, and the rise of sociological explanations for observed differences in ethnic group behavior would have led to an improved political climate for African-Americans regardless of the result in *Buchanan*. I thank Michael Klarman for raising this point.

421. 9 BICKEL & SCHMIDT, *supra* note 4, at 816 (quoting W.E.B. DUBOIS SPEAKS, SPEECHES AND ADDRESSES 1890-1919, at 52 (P.S. Foner ed., 1970)).

United States, or at least the South, from instituting South-African-style apartheid.[422]

Moreover, de jure segregation was not the only government policy that could threaten African-American welfare. In 1913, Oswald Garrison Villard of the NAACP, reacting to the spread of residential segregation laws and the segregation that President Wilson was introducing into the federal workforce,[423] warned that segregation laws were a first step in a broader attack on African-Americans. Villard compared the advocates of segregation laws to the anti-Semitic Black One Hundreds in Russia.[424] He warned that just as the Russians had started by segregating the Jews and then moved on to even more vicious anti-Semitic measures, segregation laws would be a first step in a series of anti-negro measures. Villard wondered "to what lengths despotic officials will take their way by means of discrimination, intimidation, by aboveboard or underhand methods."[425] As Leon Higginbotham has argued, "*Buchanan* was of profound importance in applying a brake to decelarate what would have been run-away racism in the United States."[426]

C. Effects on Civil Rights More Generally

Buchanan affected the history of American race relations beyond the narrow context of segregation. First, the decision was sufficient, and perhaps necessary, to establish the NAACP as an important player on the American scene. The extent to which other Supreme Court cases, including *Brown v. Board of Education*,[427] mobilized African-Americans to press for their civil rights is subject to dispute. One can, however, confidently assert that *Buchanan* mobilized large numbers of African-Americans and perhaps guaranteed

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422. Higginbotham, et al., *supra* note 192, at 770, argue that if *Buchanan* had come out the other way, in many southern states and perhaps many other parts of America the living conditions of black Americans could have been almost akin to that of black South Africans.

423. *See* VILLARD, *supra* note 181, at 8. For more on Wilson and segregation, see generally Osborn, supra note 14 (observing that African-Americans stumbled in their quest for equal recognition during Wilson's presidency); Weiss, *supra* note 14 (explaining why the Wilsonian goals of broadened opportunities and social justice placed blacks on the "furthest fringe of that [Progressive movement]").

424. *See* VILLARD, *supra* note 181, at 2.

425. *Id.* at 7.

426. HIGGINBOTHAM, *supra* note 398, at 126.

427. *Compare* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10-11 (1994) (arguing that *Brown* had little effect on the civil rights movement), *with* David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 151-60 (1994) (arguing that *Brown* was crucial to the civil rights movement).

the financial viability of the young, struggling NAACP. Before *Buchanan* was decided in November 1917, the NAACP had only 9,866 members. A membership drive after *Buchanan* resulted in 35,888 new members by June 1918.[428]

Second, *Buchanan*, along with other Supreme Court decisions on racial issues in the 1910s,[429] marked a turning point in Supreme Court jurisprudence with regard to African-Americans. The Supreme Court heard twenty-eight cases involving African-Americans and the Fourteenth Amendment between 1868 and 1910. Of these, African-Americans lost twenty-two.[430] However, between 1920 and 1943, African-Americans won twenty-five of twenty-seven cases before the Supreme Court.[431]

VII. CONCLUSION: LESSONS FROM *BUCHANAN*

I have argued elsewhere that because African-Americans had disproportionately little political influence during the *Lochner* era, they disproportionately suffered from the effects of government regulation of the economy and disproportionately benefited from court decisions that prevented governmental interference with the free market.[432] Thus, laissez-faire jurisprudence had positive effects on

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428. *See* Wright, *supra* note 220, at 52. Klarman points out that some of this increase was likely due to the impact of World War I. Nevertheless, he agrees that *Buchanan* played an important role in increasing the membership of the NAACP. *See* Klarman, *supra* note 14, at 949-50.

For an argument that a litigation strategy can have far-reaching effects on the success of a political movement well beyond the direct effects of any official legal change the movement achieves, see MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 278-310 (1994).

429. *See, e.g.*, McCabe v. Atchison, Topeka & Sante Fe Ry., 235 U.S. 151, 159-64 (1914) (discussing the constitutionality of an Oklahoma law permitting carriers to provide segregated rail cars); *see also* Klarman, *supra* note 14, at 919-32 (discussing other Supreme Court decisions).

430. *See* NELSON, *supra* note 191, at 13-14.

431. *See id.* at 162-63.

432. *See* David E. Bernstein, *The Law and Economics of Post-Civil War African-American Interstate Migration*, 76 TEX. L. REV. 781, 792-823 (discussing the effect of southern "emigrant agent" laws on African-American migration after the Civil War); David E. Bernstein, *The Shameful, Wasteful History of New York's Prevailing Wage Law*, 7 GEO. MASON U. CIV. RTS. L.J. 1, 8-13 (1997) (describing the devastating effects of prevailing wage laws on African-Americans); David E. Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. 276, 388-95 (1994) (chronicling the Davis-Bacon Act's discriminatory effects on black constrnction workers from the Depression era to the post-World War II era); David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 90-103 (1994) (discussing the negative impact of various facially neutral licensing laws on blacks); David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 119-

the welfare of African-Americans during the *Lochner* era. The history of *Buchanan* lends further support to this conclusion and tends to bely the received wisdom that economic *Lochnerism* represented a victory for the privileged over the oppressed.

Buchanan should also lead legal scholars to reassess more generally their view of the traditional jurisprudence of the *Lochner* era. Traditional jurisprudes supported not ouly what is now called economic liberty, but civil rights and civil liberties as well. Indeed, they failed to distinguish among these categories. *Buchanan* itself represented a victory not just for laissez-faire juriprudence, but also for civil rights.

The trend toward protecting the constitutional rights of African-Americans began under a post-*Lochner* traditionalist Supreme Court in the 1910s. This was not a coincidence.[433] *Lochner* signaled that traditionalists had adopted a theory of the Fourteenth Amendment that construed liberty rights under that Amendment rather broadly. And accordmg to traditional theory, the very purpose of the Constitution was to prevent temporary excitements from encroaching on American liberty,[434] to allow Philip sober to control Philip drunk.[435] There is perhaps no better example of the Constitution serving this prophylactic function than the *Buchanan* decision. Enthusiasm for residential segregation laws quickly spread through the Unrted States. If the Supreme Court had held the law was constitutional, the consequences would likely have been devastating to African-Americans. Despite the widespread popular and academic support for the segregation laws and the incredible racism of the age, the Supreme Court chose to enforce the Fourteenth Amendment and invalidate the law.

There is also a clear connection between *Lochner* era traditionalism and Supreme Court protection of civil liberties. The Supreme Court's vigorous protection of civil hberties began in the 1920s when the Court supposedly reached its "conservative" zemith.[436] Despite

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35 (1993) [hereinafter Bernstein, *Roots of the "Underclass"*] (criticizing several New Deal labor acts for contributing te the problem of persistent African-American unemployment); David E. Bernstein, *The Supreme Court and "Civil Rights," 1886-1908*, 100 YALE L.J. 725, 742 (1990) (collecting cases and concluding that the "neglect of . . . protection of economic liberty . . . had devastating consequences for disadvantaged individuals").

433. *See supra* Part II.A.

434. *See* COOLEY, *supra* note 37, at 54-55 (noting that "[t]he violence of public passion is quite as likely to be in the direction of oppression as in any other").

435. *See* Brewer, *supra* note 41, at 428.

436. *See* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 244-45 n.254 (1994).

their reputation as reactionaries, all of the "Four Horsemen" contributed to the new civil liberties jurisprudence, sometimes in dissents from majority opinions written or joined by "liberal" Justices Brandeis and Holmes.[437] In a particularly impressive series of opinions authored by Justice McReynolds in a four-year period, the Court protected Catholics from the Ku Klux Klan revival of the 1920s,[438] Japanese from the anti-Asian hysteria of the 1920s,[439] and German-Americans from the Nativism that arose during World War I and continued into the 1920s.[440] Sympathy for civil liberties from the likes of McReynolds should not be surprising, as advocates of traditional jurisprudence believed that courts had the duty to enforce constitutional limitations on government power and were fierce opponents of class legislation.[441]

Lochner era jurisprudence looks even better when one compares it to the historical alternative. Most legal scholars write about the *Lochner* era as if the choice at the time was between the traditional jurisprudence that ultimately dominated the era and a modern liberal jurisprudence of the Earl Warren/William Brennan variety. In fact, the Progressive intellectuals who advocated sociological jurisprudence and despised traditional jurisprudence evinced little concern for either individual rights or members of minority groups. Rather, "Progressive intellectuals blamed excessive individualism" for the problems of American society and objected to courts' use of the Constitution to uphold individual rights.[442]

Progressive support for residential segregation laws is only one example of the Progressives' contempt for civil rights and civil liberties.[443] Justice Holmes, the great representative of sociological juris-

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437. *See id.* (collecting civil liberties opinions authored by the "Four Horsemen"); Cushman, *supra* note 344, at 585 nn.9-12 (noting that two generations of scholars have viewed the Justices as "far right, reactionary, staunchly conservative apostles" of laissez-faire policies).

438. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (McReyolds, J.) (protecting the right to private school education from discrimimatory legislation aimed at Catholics). For background on this legislation, see generally WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927, at 148-73 (1994).

439. *See* Farrington v. Tokushige, 273 U.S. 284, 298-99 (1927) (McReynolds, J.) (striking down a law that banned private schools used by Japanese immigrants).

440. *See* Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923) (McReynolds, J.) (invalidating a law banning the teaching of foreign languages, which was typical of laws passed throughout the Midwest).

441. Unfortunately, McReynolds's crude racism often prevented him from applying these principles in cases involving African-Americans. *See* Kennedy, *supra* note 12, at 1641 (portraying McReynolds as a "white supremacist" whose disdain for minority rights became clear over time).

442. *See* Rabban, *supra* note 86, at 954-55.

443. Donald K. Pickens has noted:

prudence on the Supreme Court throughout the *Lochner* era, had an overall abysmal record on civil rights and civil liberties issues.[444] Justice Brandeis's record on such issues is also disheartening.[445]

Thus, the historical choice is not between the "conservative" traditional jurisprudence of the *Lochner* Era and modern liberal jurisprudence, but between traditional jurisprudence and the crudely majoritarian, statist, and pseudo-scientific views of the sociological school,[446] the adherents of which, judging by contemporary law review articles, generally agreed that Louisville's segregation statute was constitutional. One is entitled to believe that the triumph of sociological jurisprndence would have been the preferable alternative, but that opinion should be based on the actual record of its adherents and not on utterly anachronistic view of what legal Progressives of the early 1900s believed.

The history of *Buchanan* also has something to teach us about the New Deal era. The history recounted in this Article belies the traditional story that the basic structure of modern constitutional jurisprudence regarding the Bill of Rights emerged from a clash between two great visions of judicial review: (1) the traditional constitutionalism of the *Lochner* Era that wanted to protect phony economic

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> Recent historical scholarship has shown the absence of any systematic concern for the civil rights of individual Americans during the progressive era. One possible reason for this absence was the sociological nature of progressive reform .... [Left-wing] reformers, in their rush to correct the evils of capitalism, rejected the natural-rights thesis as mere economic rationalization preventing necessary state and national reform.

PICKENS, *supra* note 7, at 20-21.

Among other Progressive sins against civil liberties was support for state-enforced eugenic policy, *see id.* at 55-68, a disdain for freedom of speech, *see* Rabban, *supra* note 86, at 955, the Palmer raids undertaken by President Wilson's attorney general, and the militarism, imperalism, and warmongering of President Theodore Roosevelt and his followers.

444. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207-08 (1927) (Holmes, J.) (upholding a law authorizing a state to sterilize the mentally retarded and strongly endorsing the eugenic policy behind the law); Bartels v. Iowa, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting) (voting to uphold a law banning the teaching of foreign languages in school); *see also* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 337-409 (1993) (reviewing Holmes's record on civil liberties and concluding that Holmes favored deference to the legislature except in free speech cases).

445. *See* STRUM, *supra* note 340, at 314-38 (describing Brandeis's civil rights and civil liberties jurisprudence). Holmes and Brandeis ultimately supported heightened protections under the First Amendment, but not for the civil libertarian reason that it was a fundamental individual constitutional right. Rather, following ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 88-106 (1920), they believed that freedom of speech was a prerequisite of intelligent democratic deliberation and thus served an important social interest. Perhaps one reason that their free speech jurisprudence did not win over their traditional colleagues is that other Justices, as traditional anti-majoritarians, were not all that enamored of democracy, as such.

446. By the 1920s, legal realism was replacing sociological jurisprudence as the hot academic theory in the legal academy. However, it is not clear that legal realists had any significant impact on the Supreme Court at this time, while sociological jurisprudence remained influential for decades through Holmes, Brandeis, and Frankfurter.

rights but not protect fundamental non-economic rights; and (2) the Progressive jurisprudence that wanted to do the opposite.[447] The Progressive vision, according to this view, was ultimately adopted in Footnote Four of the famous *Carolene Products* case.[448]

Foonote Four announced that the Court would protect fundamental individual rights and the rights of members of discrete and insular minorities, but not economic liberties. The ideology implicit in the footnote may be "progressive" in the sense that its intellectual foundations lie on the left-wing of the political spectrum. However, given Progressive contempt for individual rights and the manifest racism of many leading Progressives, Footnote Four cannot accurately be described as Progressive in the historical sense.

Moreover, it is not at all clear that Footnote Four represents a victory for the constitutional protection of individual rights, as opposed to a retreat. The constitutional triumph of New Deal economic policies was not a triumph for individual rights, but a triumph for statism.[449] Within the sea of New Deal statism, the Supreme Court

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447. *See* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L. J. 941, 941 (1997) (describing the traditional story).

448. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938); *see also* Gray, *supra* note 63, at 27-28 (exploring how notions of what "ought to be" in law broaden jurisprudence).

449. A recent article also argues that the New Deal represented, more than anything else, the triumph of statism. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 520-32 (1997).

Bruce Ackerman has argued that the New Deal was a necessary prerequisite for federal court protection of African-American rights, because the essence of the constitutional battles during the New Deal was over the government's authority to pursue " 'social, as distinguished from political, equality.' " ACKERMAN, *supra* note 140, at 146 (quoting Plessy v. Ferguson, 163 U.S. 537, 544 (1896)). In fact, few of the most important cases of the 1930s were primarily about social equality. This is particularly true of the cases involving the scope of the federal government's power, as opposed to those cases dealing with the scope of the states' police powers.

Once one recognizes that the constitutional battles of the 1930s were really about government power *per se* and not about government power to pursue social equality, Ackerman's point actually cuts the other way. With pre-New Deal limits on government authority reduced significantly, *Buchanan v. Warley* would seem to have been under greater direct threat than *Plessy*. It is only an accident of history that the aggressive support for civil rights in the courts followed the New Deal. *See* Klarman, *supra* note 141, at 789-90 (arguing that World War II and the changes in racial attitudes it fostered, and not the New Deal, were key elements leading to *Brown*). Certainly, the Progressives wanted the government to have the power to pursue social equality, but had they been as successful in their quest to enlarge the power of government as the New Dealers were in theirs, the consequences for civil rights would have been much less happy.

Meanwhile, a racially egalitarian but jurisprudentially traditional Court would have had no trouble enforcing a classical liberal vision of civil rights. As I wrote several years ago:

> It is possible to imagine that but for the interruption of the Great Depression and the New Deal, entirely different forms of civil rights protections would have arisen—a laissez-faire combination of equal protection of the law, liberty of contract, and freedom of association, instead of the more statist combination of interest group liberalism, the wel-

chose to protect small islands of individual rights. *Carolene Products* arose not as a part of the the triumph of the Progressive tradition, but in response to the dangers that that triumph represented.[450]

The Justices of the Supreme Court were in retreat from their previous activism on behalf of individual rights against the state, but, with totalitarianism looming in Europe, they recognized the importance of continuing to at least protect vulnerable minorities and First Amendment rights once power became concentrated at the national level.[451] Rather than declaring new rights, the *Carolene Products* Court announced that it would continue the protection of minority constitutional interests and civil liberties it had begun in *Buchanan v. Warley*[452] and other pre-New Deal decisions,[453] even while it generally abdicated review of economic regulations.[454]

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fare state, and government enforcement of nondiscrimination norms against private parties.

Bernstein, *Roots of the "Underclass"*, *supra* note 432, at 135; *see also* MORENO, *supra* note 9, at 29 (noting that "[f]ree market principles . . . contained their own set of antidiscrimination principles").

As historian Raymond Wolters has noted, "[t]he New Deal was essentially an attempt to solve the nation's economic problems democratically, but such a 'democratic' system usually gives the greatest benefits to those who are best organized." *See* WOLTERS, *supra* note 414, at xi. African-Americans may have been a discrete and insular minority eligible for protection under Footnote Four, but they were also among the politically worst organized groups and were often disenfranchised as well. African-Americans therefore received disproportionately few benefits from the New Deal but suffered from a disproportionate allocation of the burdens. *See* Bernstein, *Roots of the "Underclass"*, *supra* note 432, at 131-33.

450. *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289-97 (1982).

451. The importance of Catholics, Jews, and, to a lesser extent, African-Americans in the New Deal Coalition may also have played a role in the left's newfound sympathy for minority groups. The author thanks Michael Klarman for raising this point.

452. 245 U.S. 60, 82 (1917) (overturning racial zoning).

453. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 71-73 (1932) (overturning the conviction of the "Scottsboro boys"); Farrington v. Tokushige, 273 U.S. 284, 298-99 (1927) (invalidating a law banning private schools run for the benefit of Japanese immigrants); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (McReynolds, J.) (protecting the right to private school education from discriminatory legislation aimed at Catholics); Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923) (McReynolds, J.) (protecting the right to teach foreign language by invalidating a statute which arose from prejudice against German immigrants during World War I); Adkins v. Children's Hosp., 261 U.S. 525, 554-62 (1923) (invalidating a minimum wage law that applied to women only), *overruled in part by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

454. *See* Cushman, *supra* note 344, at 579 (positing that the "Four Horsemen simply did not differentiate economic from noneconomic forms of civil liberty in the way that has come to be seen as obvious and natural in moderal liberal thought, and in liberal constitutionalism at least" since Footnote Four of *Carolene Products*).

It is worth noting that Felix Frankfurter, the last Justice to come out of the Progressive/sociological jurisprudence tradition, did not easily reconcile himself to the Court's aggressive protection of individual rights. *See, e.g.*, H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 147-76 (1981); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 252-64 (1992); CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 210-17 (1961); JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER, AND CIVIL

The history of *Buchanan* also has some relevance to current political debates. In the last few years, nostalgia for Progressivism has grown. Political figures ranging from President Clinton and House Minority Leader Richard Gephardt to liberal pundits Michael Lind and E.J. Dionne to conservative commentators William Kristol and David Brooks have argued that modern Americans should look to the energetic, muscular, interventionist government of the Progressive era as a model for today.[455]

The events leading up to *Buchanan* should serve as a reminder that energetic "Progressive" government is also dangerous government. While modern Progressivists are undoubtedly well-meaning, so were the original Progressives. One should recall that the same passions that motivated Progressivism and still motivate its modern intellectual descendants also provided intellectual support for segregation ordinances. These passions included the belief that politics should be responsive to public opinion, distrnst of property rights and individualism, and faith in the ability of government to manage society "scientifically." In the end, "scientific" management of property rights became an excuse for putting the base prejudices of white Americans into the law.

The project of Progressivism was, and remains for its modern sympathizers, to overcome traditional American political and constitutional resistance to statism. Every generation has its absurd and often dangerous prejudices that later generations expose and ridicule. The ouly way to prevent those prejudices from becoming the law of the Iand is for the general public, its elected representatives, and the courts to maintain a skeptical view of the role of government in society. One can only hope, therefore, that the current vogue of

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LIBERTIES IN MODERN AMERICA 101-56 (1989); MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 134-43, 212-14 (1991).

455. *See* E. J. DIONNE, JR., THEY ONLY *LOOK* DEAD: WHY PROGRESSIVES WILL DOMINATE THE NEXT POLITICAL ERA 265-313 (1996); MICHAEL LIND, THE NEXT AMERICAN NATION 347 (1996); Peter S. Canellos, *A Step in the "Progressive" Direction: Gephardt Repeats Plea for Party to Return to its Old Core Values*, BOSTON GLOBE, Dec. 4, 1997, at A11; William Kristol & David Brooks, *What Ails Conservatism*, WALL ST. J., Sept. 15, 1997, at A22; Jon Sawyer, *Clinton Stumps for Rebirth of Progressive Era: Likens Tumult of Today to Days of Reform 100 Years Ago*, ST. LOUIS POST-DISPATCH, Oct. 9, 1995, at 5B. The author also heard Speaker Newt Gingrich praise the politics of the Progressive Era at a gathering sponsored by the Smithsonian Institute on March 12, 1998. *See* Richard Bindetto, *Enlightenment and Emptiness Side by Side*, USA TODAY, Mar. 16, 1998, at 10A.

With unintended irony, Brooks and Kristol argue that modern conservatives should look to the "conservative nationalism" of Theodore Roosevelt for inspiration. Roosevelt did not claim to be a conservative, nor would one reasonably say in hindsight that he was a conservative relative to the political spectrum of his day.

Progressivism is a passing trend and not a harbinger of future politics.

Finally, it is worth noting that sociological jurisprudence still thrives in constitutional discourse, particularly with regard to civil rights under the Fourteenth Amendment and freedom of speech under the First Amendment. One consistently reads appeals for the judiciary to focus on "modern social realities" when deciding cases in these areas.[456]

As the history of pro-segregation sentiment shows, however, social realities are not self-evident and social science is not immune to influence from general intellectual trends. Future government policy in the First Amendment and civil rights areas may be influenced primarily by Catharine MacKinnon, Cornel West, and like-minded individuals; or, it may be influenced primarily by Pat Robertson, Dinesh D'Souza, and their compatriots; or by some other faction. Regardless, adoption of sociological jurisprudence would ultimately serve statist ends, encouraging the judiciary to defer to the policies imposed by the winners. It was to avoid putting Americans' liberties in the hands of the vagaries of temporary[457] political and intellectual trends that the Constitution's Framers and its amendments created a written document with ascertainable interpretative boundaries that established strict controls on government power.[458] Perhaps, then, one should reinterpret Chief Justice Marshall's famous aphorism: because it is "a Constitution we are expounding,"[459] courts should ignore the allure of sociological theories and enforce the limitations on government imposed by the Constitution.

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456. One insidious attack on constitutional protection of freedom of speech was entitled "Free Speech and Social Structure." *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1405 (1986). Where have you gone, Roscoe Pound?

457. As discovered during the 1930s, courts cannot hold out indefinitely against massive political and intellectual forces aligned against constitutional limitations on government authority.

458. For example, since the First Amendment states "Congress shall make no law," *see* U.S. CONST. amend. I, it cannot possibly mean, as some would have it, that "Congress must make a law," even if that seems like good social policy for the moment.

459. McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).